Supreme Court, U.S.
FILED

116

No. 08-887

JAN 12 2009

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In The

# Supreme Court of the United States

COUNTY OF SAN DIEGO, et al.,

*Petitioners,*

vs.

SAN DIEGO NORML, et al.,

*Respondents.*

**On Petition For Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District, Division One**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Whether California's Medical Marijuana Law, which authorizes individuals to use, possess and cultivate marijuana for medical purposes, is pre-empted under the Supremacy Clause by the federal Controlled Substances Act, which prohibits the same conduct?

Whether the Controlled Substances Act's express preemption clause precludes a court from considering whether California's Medical Marijuana Law is an obstacle to the accomplishment of the purposes and objectives of the federal law in deciding whether the California law is preempted?

## PARTIES TO THE PROCEEDING

Petitioner is the County of San Diego.

Respondents are the State of California, Dr. Mark Horton, in his official capacity,[1] San Diego NORML, Wo/men's Alliance for Medical Marijuana, Dr. Stephen O'Brien, Wendy Christakes, Norbert Litzinger, William Britt, Yvonne Westbrook, Americans For Safe Access,[2] County of San Bernardino and Gary Penrod, Sheriff of San Bernardino County.[3]

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[1] Dr. Mark Horton is substituted in place of prior officeholder Sandra Shewry, who was sued in her official capacity. See Fed. R. App. P. 43(c)(2).

[2] The San Diego County Superior Court allowed the Wo/men's Alliance for Medical Marijuana, Dr. Stephen O'Brien, Wendy Christakes, Norbert Litzinger, William Britt, Yvonne Westbrook, and Americans For Safe Access to intervene into this case as defendants. (Clerk's Transcript ("C.T."), Vol. III, at 479-483).

[3] The County anticipates that the County of San Bernardino and Mr. Penrod will file a separate Petition for a Writ of Certiorari.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| PARTIES TO THE PROCEEDING | ii |
| TABLE OF CONTENTS | iii |
| TABLE OF AUTHORITIES | vi |
| PETITION FOR WRIT OF CERTIORARI | 1 |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL PROVISION INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| A. Factual/Legal Background | 3 |
| B. Litigation History | 6 |
| REASONS FOR GRANTING THE PETITION | 13 |
| ARGUMENT | 19 |
| I. CALIFORNIA'S MEDICAL MARIJUANA LAW IS AN OBSTACLE TO THE ACCOMPLISHMENT OF THE PURPOSES AND OBJECTIVES OF THE CSA, AND IS THEREFORE PREEMPTED | 20 |
| A. The Medical Marijuana Law Is An Obstacle | 20 |
| 1. The CSA Regulates The Medicinal Use Of Marijuana | 23 |
| 2. Retention Of Federal Authority To Prosecute Is Not Enough To Avoid A Conflict | 26 |

TABLE OF CONTENTS – Continued

Page

3. The Medical Marijuana Law Goes Beyond Merely Decriminalizing Conduct Under State Law ..... 26

II. THE COURT OF APPEAL ERRED IN CONCLUDING THAT THE OBSTACLE PREEMPTION TEST DOES NOT APPLY ..... 27

III. THE COURT OF APPEAL ERRED IN REFUSING TO OFFICIALLY DECIDE WHETHER THE PROVISIONS OF THE MEDICAL MARIJUANA LAW AUTHORIZING INDIVIDUALS TO USE MARIJUANA FOR MEDICAL PURPOSES ARE PREEMPTED BY THE CSA ..... 32

A. If The County Does Not Have Standing To Challenge The Provisions That Authorize The Use Of Marijuana For Medical Purposes, These Provisions Will Go Unchallenged..... 37

CONCLUSION ..... 38

APPENDIX

July 31, 2008 Opinion of the California Court of Appeal, Fourth Appellate District, Division One ..... App. 1

December 6, 2006 Order of the San Diego County Superior Court Granting the Defendants' Motions for Judgment on the Pleadings and Denying the Plaintiffs' Motion for Judgment on the Pleadings ..... App. 48

TABLE OF CONTENTS – Continued

Page

January 30, 2007 Notice of Entry of Judgment, filed in the San Diego County Superior Court ..... App. 61

October 16, 2008 Order of the California Supreme Court Denying the Petitions for Review ..... App. 68

June 13, 2006 Notice of San Diego County Superior Court's Ruling on the Defendants' Demurrer ..... App. 69

California Health and Safety Code §§ 11362.5-11362.82 ..... App. 75

# TABLE OF AUTHORITIES

Page

CASES

*Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001) ..... 9, 31

*Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) ..... 20

*Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000) ..... 9, 29

*English v. General Electric Co.*, 496 U.S. 72 (1990) ..... 20

*Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) ..... 9, 29, 30, 31

*Gonzales v. Oregon*, 546 U.S. 243 (2006) ... 11, 23, 24, 25

*Gonzales v. Raich*, 545 U.S. 1 (2005) ..... *passim*

*Lockyer v. City and County of San Francisco*, 33 Cal. 4th 1055 (2003) ..... 33

*Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002) ..... 9, 31

*United States v. Alden*, 2005 U.S. App. LEXIS 15633 (9th Cir. 2005) ..... 38

*United States v. Moore*, 423 U.S. 122 (1975) ..... 24

*United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001) ..... *passim*

*Whitmore v. Arkansas*, 495 U.S. 149 (1990) ..... 32

TABLE OF AUTHORITIES – Continued

Page

STATUTES

21 U.S.C. § 801(1) ..... 16
21 U.S.C. § 801(7) ..... 3
21 U.S.C. § 812(b)(1)(B) ..... 11, 21, 23
21 U.S.C. § 812(c) (sched. I) (c)(10) ..... 11, 21, 23
21 U.S.C. § 841(a) ..... 3, 15
21 U.S.C. § 841(f) ..... 15
21 U.S.C. § 844(a) ..... 3
21 U.S.C. § 903 ..... 9, 28, 29
28 U.S.C. § 1257 ..... 2
Cal. Health & Safety Code § 11362.5 ..... 4
Cal. Health & Safety Code § 11362.5(a-c) ..... 5
Cal. Health & Safety Code § 11362.5(e) ..... 5
Cal. Health & Safety Code § 11362.5(b)(1)(A) ..... 4, 5, 6
Cal. Health & Safety Code § 11362.5(d) ..... 26
Cal. Health & Safety Code §§ 11362.7-11362.83 ..... 4
Cal. Health & Safety Code § 11362.7(g) ..... 4, 5
Cal. Health & Safety Code § 11362.71(b)(5) ..... 4, 33
Cal. Health & Safety Code § 11362.71(e) ..... 5
Cal. Health & Safety Code § 11362.77(a) ..... 5, 6
Cal. Health & Safety Code § 11362.77(b) ..... 5, 6
Cal. Health & Safety Code § 11362.77(c) ..... 5
Cal. Health & Safety Code § 11362.77(f) ..... 6

TABLE OF AUTHORITIES – Continued

Page

Cal. Health & Safety Code § 11362.765(a) .....6

Cal. Health & Safety Code § 11362.795(a)(1).....6

Cal. Health & Safety Code § 11362.795(a)(3).....6

Cal. Health & Safety Code § 11362.795(b)(2).....6

H.R. Rep. No. 91-1444, *reprinted in* 1970 U.S.C.C.A.N. 4456.....22

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Article III.....32

U.S. Constitution, Article VI, Clause 2.....2

MISCELLANEOUS

Andrew King, Comment, *What the Supreme Court Isn't Saying About Federalism, the Ninth Amendment, and Medical Marijuana*, 59 Ark. L. Rev. 755 (2006).....21

U.S. Supreme Court Rule 12(c).....14

http://www.drugabuse.gov/about/organization/nacda/marijuanastatement.html.....4

http://grants.nih.gov/grants/guide/notice-files/not99-091.html .....4

http://www.mlive.com/politics/index.ssf/2008/11/michigan_voters_approve_medica.html .....21

## PETITION FOR A WRIT OF CERTIORARI

Petitioner County of San Diego ("the County") respectfully petitions for a Writ of Certiorari to review the judgment of the California Court of Appeal, Fourth Appellate District, Division One.

## OPINIONS BELOW

The California Court of Appeal's decision is reported at 81 Cal. Rptr. 3d 461, and is reprinted in the Appendix to the Petition ("App.") at 1-47. The California Supreme Court's decision denying the County's Petition for Review of the California Court of Appeal's decision is available electronically at 2008 Cal. LEXIS 12220 (Cal. October 16, 2008), and appears in the Appendix at 68. The San Diego County Superior Court's order granting defendants' motion for judgment on the pleadings, which the California Court of Appeal reviewed and affirmed, appears in the Appendix at 48-60.

## JURISDICTION

The California Court of Appeal issued its decision on July 31, 2008. The County of San Diego, the County of San Bernardino and Mr. Penrod filed timely Petitions for Review asking the California Supreme Court to review the judgment of the California Court of Appeal. The California Supreme Court denied the Petitions for Review on October 16, 2008.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

## CONSTITUTIONAL PROVISION INVOLVED

Article VI, Clause 2 of the United States Constitution provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

## STATEMENT OF THE CASE

California is one of thirteen states that have legalized marijuana use. California's Medical Marijuana Law specifically authorizes individuals and "caregivers" to use, possess, cultivate and transport marijuana for medical purposes.[1] The Law also requires counties to issue cards identifying those individuals who California has authorized to use marijuana for medical purposes ("identification

[1] Unless otherwise indicated, references to the "use" of marijuana should be read to also include the possession, cultivation, and transportation of marijuana.

cards"). The Medical Marijuana Law is preempted because it is an obstacle to the accomplishment of the purposes and objectives of the federal Controlled Substances Act ("CSA"), which bans marijuana use for any purpose.

## A. Factual/Legal Background

In 1970, Congress passed the CSA, in part to comply with the United States' obligations under an international treaty called the Single Convention on Narcotic Drugs (the "Single Convention"). 21 U.S.C. § 801(7).

In the CSA, Congress designated marijuana as a Schedule I drug and determined that it has "no currently accepted medical use in treatment in the United States." 21 U.S.C. §§ 812(b)(1)(B), 812(c) (sched. I)(c)(10).[2] Therefore, Congress criminalized the manufacture, possession and distribution of marijuana for any purpose. 21 U.S.C. §§ 841(a), 844(a).

In addition, as authorized by the Single Convention, the United States decided to allow cultivation of limited amounts of marijuana for research purposes. The United States designated the National Institute on Drug Abuse ("NIDA") as the agency responsible for overseeing the cultivation of marijuana according to

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[2] Congress' classification of marijuana as a Schedule I drug has been repeatedly challenged. Those challenges have consistently been rejected. *Gonzales v. Raich*, 545 U.S. 1, 15 n.23 (2005).

the terms of the Single Convention. NIDA entered into a contract with the University of Mississippi whereby NIDA has the option in any given year of growing 1.5 or 6.5 acres of marijuana, or none at all, depending on the research demand. NIDA is the only legal source for marijuana in the United States. http://www.drugabuse.gov/about/organization/nacda/marijuanastatement.html; http://grants.nih.gov/grants/guide/notice-files/not99-091.html.

In 1996, California voters sought to override Congress' judgment and the Single Convention by passing Proposition 215, an initiative which added Section 11362.5 to the California Health and Safety Code. Proposition 215 declares that "Californians have the right to obtain and use marijuana for medical purposes. . . ." Cal. Health & Safety Code § 11362.5(b)(1)(A). Contrary to the CSA, Proposition 215 also declares that "patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction." *Id.* at subd. (b)(1)(B).

In 2003, the California Legislature enacted a statutory scheme implementing Proposition 215. Cal. Health & Safety Code §§ 11362.7-11362.83. This statutory scheme requires the County to issue identification cards to "a person authorized to engage in the medical use of marijuana and the person's designated primary caregiver. . . ." *Id.* at §§ 11362.7(g), 11362.71(b)(5). Despite the provisions of the CSA, California's statutory scheme declares that "[n]o person or designated

primary caregiver in possession of a valid identification card shall be subject to arrest for possession, transportation, delivery, or cultivation of medical marijuana in an amount established pursuant to this article. . . ." *Id.* at § 11362.71(e).

The California Legislature also authorized patients and caregivers to cultivate "six mature or 12 immature marijuana plants per qualified patient" even though under the Single Convention only NIDA may license individuals to cultivate marijuana. *Id.* at § 11362.77(a). If a doctor so recommends, those quantities can be increased to an amount "consistent with the patient's needs." Cal. Health & Safety Code § 11362.77(b). Moreover, cities and counties may enact guidelines that allow patients and caregivers to exceed the statutory quantities. Cal. Health & Safety Code § 11362.77(c); *Raich*, 545 U.S at 31 n.41 ("[C]ities and counties are given *carte blanche* to establish more generous limits. . . . For example, patients residing in the cities of Oakland and Santa Cruz and in the counties of Sonoma and Tehama are permitted to possess up to 3 pounds of processed marijuana. Putting that quantity in perspective, 3 pounds of marijuana yields roughly 3,000 joints or cigarettes.") (emphasis in original).

Additional provisions within the Medical Marijuana Law[3] expressly state that individuals are

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[3] Collectively, California Health and Safety Code sections 11362.5(a)-(c) and (e), and sections 11362.7 through 11362.83 are

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authorized to use, possess and cultivate marijuana for medical purposes. Cal. Health & Safety Code §§ 11362.7(g); 11362.5(b)(1)(A); 11362.765(a); 11362.77(a); 11362.77(b); 11362.77(f); 11362.795(a)(1); 11362.795(a)(3); and 11362.795(b)(2).

**B. Litigation History**

In late 2005, defendant and respondent San Diego NORML sent the County a letter threatening to file a lawsuit if the County did not begin issuing the identification cards required by the Medical Marijuana Law. (C.T., Vol. I, at 9). Rather than wait for San Diego NORML's lawsuit, the County filed this action against the State of California, the Director of the Department of Health Services (collectively the "State") and San Diego NORML in San Diego County Superior Court, seeking a declaration that the Medical Marijuana Law is preempted under the Supremacy Clause by the CSA. (*Id.* at 1-11).

The County sought a declaration that the provisions of the Medical Marijuana Law authorizing individuals to use marijuana for medical purposes are preempted. (*Id.*). Since California cannot authorize individuals to use marijuana for medical purposes, the County also sought a declaration that California cannot require counties to issue identification cards to individuals authorized to use marijuana. (*Id.*).

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referred to herein as the Medical Marijuana Law. Those sections appear at pages 75-97 of the Appendix.

The State filed a demurrer, asserting in part that the County did not have standing to challenge any of the provisions of the Medical Marijuana Law. (*Id.* at 27-43). The Superior Court overruled the State's demurrer, finding that the County had standing to challenge the Medical Marijuana Law in its entirety on preemption grounds. (*Id.*, Vol. II, at 368-371).

Thereafter, the parties filed cross-motions for judgment on the pleadings. (*Id.*, Vols. III, IV & V, at 514-975; Vol. V, at 1030-1049, 1058-1117). The County argued that the Medical Marijuana Law is an obstacle to the accomplishment of the purposes and objectives of the CSA, and is therefore preempted under the Supremacy Clause. Specifically, by authorizing individuals to use, possess and cultivate marijuana for medical purposes, the Medical Marijuana Law made it significantly more difficult to achieve Congress' goal of eradicating marijuana use. Since California cannot authorize individuals to use marijuana, it also cannot require counties to issue identification cards to individuals authorized to use marijuana.

The State repeated its argument that the County did not have standing to challenge any portion of the Medical Marijuana Law, and that even if it did, the Medical Marijuana Law was not preempted by the CSA.

The Superior Court again rejected the State's standing argument and reached the merits of the County's position. (App. at 53). However, the Superior

Court concluded that no part of the Medical Marijuana Law is preempted by the CSA. Therefore, the Superior Court granted judgment on the pleadings in favor of the defendants. (*Id.* at 53-58).

The County filed an appeal. In a published opinion, the Court of Appeal affirmed the judgment of the Superior Court, but on different grounds.

The Court of Appeal first concluded that the County had standing to challenge the provisions of the Medical Marijuana Law that require counties to issue identification cards, but did not have standing to challenge the provisions that actually authorize individuals to use marijuana – conduct that violates federal law. The Court of Appeal acknowledged that, as to those provisions, "California's decision to enact statutory exemptions from state criminal prosecution for such persons[4] arguably ***undermines the goals of or is inconsistent with the CSA***. . . ." (*Id.* at 37) (emphasis added).

Nonetheless, the Court of Appeal refused to officially decide whether California could authorize individuals to use marijuana for medical purposes, even though resolution of this question was integral to determining whether the County could be required to issue the identification cards. It is plain that if California cannot authorize individuals to use

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[4] The Court of Appeal was referring to medical marijuana users and caregivers.

marijuana for medical purposes, it cannot require counties to issue cards identifying those individuals authorized to use marijuana. Thus, the Court of Appeal erred in refusing to consider whether the provisions of the Medical Marijuana Law authorizing individuals to use marijuana are preempted.

In considering whether the identification card requirement was preempted, the Court of Appeal concluded that the CSA's preemption clause expresses Congress' intent that a state law is preempted only where it is impossible to comply with both the state law and the CSA simultaneously. (*Id.* at 34). The CSA's express preemption clause states that preemption will occur where "there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together." 21 U.S.C. § 903. The Court of Appeal offered no persuasive support for its conclusion that the phrase "positive conflict" means "impossibility."

Further, contrary to this Court's decisions in *Geier v. American Honda Motor Co.*, 529 U.S. 861, 871 (2000), *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 352 (2001), and *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002), the Court of Appeal concluded that the express preemption clause precluded it from applying the obstacle preemption test in deciding whether the identification card requirement is preempted by the CSA. (App. at 32-34). Under the obstacle preemption test, a state law is preempted if it is an obstacle to the accomplishment of the purposes and objectives of Congress. *Crosby v.*

*Nat'l Foreign Trade Council*, 530 U.S. 363, 372-373 (2000). In effect, the California Court of Appeal concluded that the CSA's preemption clause expresses Congress' intent to allow states to pass laws that conflict with the purposes and objectives of the CSA.

Applying the "impossibility" test, the Court of Appeal stated that the

> [c]ounties do not identify any provision of the CSA necessarily violated when a county complies with its obligations under the state identification laws. The identification laws obligate a county only to process applications for, maintain records of, and issue cards to, those individuals entitled to claim the exemption. ***The CSA is entirely silent on the ability of states to provide identification cards to their citizenry***, and an entity that issues identification cards does not engage in conduct banned by the CSA.

(App. at 34-35) (footnote omitted) (emphasis added). The Court of Appeal, however, failed to consider the fact that the cards at issue identify those individuals authorized to use marijuana. Since the CSA declares that marijuana has no medically accepted use, Congress effectively banned states from issuing cards officially recognizing individuals authorized to use marijuana in violation of the CSA.

Although holding that only the "impossibility" preemption test should be applied, the Court of Appeal also concluded that, if the obstacle preemption test were applied, the identification card requirement

would not be preempted because it is not an obstacle to the accomplishment and execution of the purposes and objectives of the CSA. (*Id.* at 36-41).

In reaching this conclusion, the Court of Appeal relied, in part, on this Court's decision in *Gonzales v. Oregon*, 546 U.S. 243 (2006), asserting that the "purpose of the CSA is to combat recreational drug use, not to regulate a state's medical practices." (App. at 37). However, the use of marijuana for a purported medical purpose is by definition recreational drug use because Congress has declared that marijuana has no acceptable medical use. 21 U.S.C. §§ 812(b)(1)(B), 812(c)(sched. I)(c)(10). Moreover, by declaring it unlawful for any individual to use, possess or cultivate marijuana for any purpose, Congress has displaced state laws that allow (1) individuals to use marijuana for medical purposes and (2) doctors to provide recommendations that patients can use to obtain marijuana.

In finding that the identification cards are not an obstacle to the accomplishment of the purposes and objectives of the CSA, the Court of Appeal also concluded that

> California's decision to enact statutory exemptions from state criminal prosecution for such persons arguably undermines the goals of or is inconsistent with the CSA. . . . [However,] any alleged "obstacle" to the federal goals is presented by those California statutes that *create the exemptions*, not by the statutes providing a system for rapidly

> identifying exempt individuals. The identification card statutes impose no significant *added* obstacle to the purposes of the CSA not otherwise inherent in the provisions of the exemptions. . . .

(App. at 37-38) (emphasis in original).

As discussed above, the Court of Appeal should have decided whether the provisions of the Medical Marijuana Law authorizing individuals to use marijuana are an obstacle to the accomplishment of the purposes and objectives of Congress. This is true because if those provisions pose such an obstacle, California cannot require counties to issue the identification cards.[5]

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[5] The California Court of Appeal invoked the Eleventh Amendment's Anti-Commandeering Doctrine to address an argument that the County never made. According to the court, "[c]ounties also appear to assert [that] the identification card laws present a significant obstacle to the CSA because the bearer of an identification card will not be arrested by California's law enforcement officers despite being in violation of the CSA. However, the unstated predicate of this argument is that the federal government is entitled to conscript a state's law enforcement officers into enforcing federal enactments, over the objection of that state, and this entitlement will be obstructed to the extent the identification card precludes California's law enforcement officers from arresting medical marijuana users." (App. at 38-39).

The Court of Appeal misconstrued the County's position. The County noted that the Medical Marijuana Law is silent on the issue of whether California law enforcement officials may arrest individuals for violating the CSA. Therefore, the County never argued that the identification card requirement is an

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Following the Court of Appeal's decision, the County as well as the County of San Bernardino and Mr. Penrod filed timely Petitions for Review asking the California Supreme Court to review the judgment of the California Court of Appeal. The California Supreme Court denied the Petitions for Review on October 16, 2008. (*Id.* at 68).

Because the provisions of California law authorizing individuals to use marijuana for medical purposes are an obstacle to the accomplishment of the purposes and objectives of the CSA, this Court should grant this Petition and find the entire Medical Marijuana Law preempted.

## REASONS FOR GRANTING THE PETITION

This Petition should be granted because this case presents an important question – whether state laws that authorize individuals to use marijuana for

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obstacle to the accomplishment of the purposes and objectives of the CSA because it prohibits state law enforcement officials from arresting California medical marijuana users for violating the CSA. Moreover, the Court of Appeal never found that under the Medical Marijuana Law, a holder of an identification card cannot be arrested by a state law enforcement officer for violating the CSA. Rather, the Court of Appeal concluded that "the fact that California has decided to exempt the bearer of an identification card from arrest ***by state law enforcement for state law violations*** does not invalidate the identification laws under obstacle preemption." (*Id.* at 40) (emphasis added). Accordingly, the Anti-Commandeering Doctrine is inapplicable.

medical purposes are preempted by the CSA, which prohibits marijuana use for any reason. This important question has not been decided – but should be decided – by this Court. Supreme Court Rule 12(c).

If the Court of Appeal's decision is allowed to stand, it will have a profound impact on the federal government's war on illegal drugs. States containing a significant portion of the population of the United States have enacted laws that authorize individuals to use marijuana for medical purposes – conduct that violates federal law. If these laws remain in place, individuals will be more likely to use marijuana and this will severely undermine Congress' goal of eradicating marijuana use. Moreover, it is inevitable that marijuana originally grown for medicinal use will fall into the hands of recreational drug users. In addition, recreational drug users will exploit the Medical Marijuana Law in order to obtain a marijuana recommendation from a doctor when such a recommendation is not warranted. This will make it even more difficult to achieve Congress' goal of eliminating the use of illegal drugs.

This Court is no stranger to California's Medical Marijuana Law. On two prior occasions, it has considered the interplay between the CSA and the Medical Marijuana Law. *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001) and *Raich*. On both of those occasions, the Court specifically recognized that under the CSA, marijuana has no medically acceptable use. In these cases, the Court

rejected challenges to Congress' power to make this determination.

In *Oakland Cannabis Buyers' Cooperative*, groups formed "medical cannabis dispensaries" after the passage of Proposition 215. 532 U.S. at 486. In 1998, the United States sued one of the dispensaries – Oakland Cannabis Buyers' Cooperative – seeking to enjoin the Cooperative from distributing and manufacturing marijuana. *Id.* at 486-487. The United States "argued that, whether or not the Cooperative's activities are legal under California law, they violate federal law." *Id.* at 487. Specifically, the United States argued that the Cooperative's activities violated the CSA. The district court agreed, and issued a preliminary injunction enjoining the Cooperative from distributing and manufacturing marijuana. The district court also denied the Cooperative's request to modify the injunction to allow the distribution of marijuana when it was medically necessary. The United States Court of Appeals for the Ninth Circuit reversed the district court's order refusing to modify the injunction, concluding that medical necessity was a "legally cognizable defense" under the CSA and that this defense would likely apply. *Id.* at 488.

This Court reversed. The Court noted that the only exception to the prohibitions contained in the CSA for Schedule I drugs is for "Government-approved research projects." *Id.* at 490 (citing 21 U.S.C. § 841(f)). However, the Cooperative argued "that notwithstanding the apparently absolute language of § 841(a), the statute is subject to additional,

implied exceptions, one of which is medical necessity." *Id.* The Court flatly rejected the Cooperative's argument.

According to the Court, the CSA

> reflects a determination that marijuana has no medical benefits worthy of an exception (outside the confines of a Government-approved research project). Whereas some other drugs can be dispensed and prescribed for medical use, the same is not true for marijuana. Indeed, for purposes of the Controlled Substances Act, marijuana has "no currently accepted medical use" at all.

*Id.* at 491 (citations omitted). The Court concluded that

> [i]t is clear from the text of the Act that Congress has made a determination that marijuana has no medical benefits worthy of an exception. The statute expressly contemplates that many drugs "have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people," § 801(1), but it includes no exception at all for any medical use of marijuana.

*Id.* at 493.

In *Raich*, the plaintiffs filed a lawsuit against the United States Attorney General and the federal Drug Enforcement Agency, seeking to prohibit those officials from enforcing the CSA "to the extent it

prevents them from possessing, obtaining, or manufacturing cannabis [marijuana] for their personal medical use." *Raich,* 545 U.S. at 7. The plaintiffs claimed that "enforcing the CSA against them would violate the Commerce Clause. . . ." *Id.* at 8.

The issue before the Court was

> whether the power vested in Congress by Article I, § 8, of the Constitution "[t]o make all Laws which shall be necessary and proper for carrying into Execution its authority to regulate Commerce with foreign Nations, and among the several States" ***includes the power to prohibit the local cultivation and use of marijuana in compliance with California law***.

*Id.* at 5 (emphasis added). Early in its analysis, the Court noted that

> [b]y classifying marijuana as a Schedule I drug [under the CSA], as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration pre-approved research study.

*Id.* at 14 (citations omitted).

The plaintiffs in *Raich* argued that the CSA's "categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical

purposes pursuant to California law exceeds Congress' authority under the Commerce Clause." *Id.* at 15. The Ninth Circuit had accepted the plaintiffs' argument, concluding that "the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law" is "beyond the reach of federal power." *Id.* at 26 (internal quotation marks and citation omitted). The Ninth Circuit "characterized this class [of medical marijuana users authorized by state law] as different in kind from drug trafficking." *Id.* (internal quotation marks and citation omitted).

This Court rejected the Ninth Circuit's conclusion. The Court stated that

> [t]he differences between the members of a class so defined and the principal traffickers in Schedule I substances might be sufficient to justify a policy decision exempting the narrower class from the coverage of the CSA. The question, however, is whether Congress' contrary policy judgment, *i.e.*, its decision to include this narrower "class of activities" within the larger regulatory scheme, was constitutionally deficient. We have no difficulty concluding that Congress acted rationally in determining that none of the characteristics making up the purported class, whether viewed individually or in the aggregate, compelled an exemption from the CSA. . . .

*Id.*

The Court also indicated that

> the fact that marijuana is used for personal medical purposes on the advice of a physician cannot itself serve as a distinguishing factor. The CSA designates marijuana as contraband for *any* purpose; in fact, by characterizing marijuana as a Schedule I drug, Congress expressly found that the drug has no acceptable medical uses.

*Id.* at 27 (internal quotation marks and citation omitted).

The Court further concluded that

> limiting the activity to marijuana possession and cultivation in accordance with state law cannot serve to place respondents' activities beyond congressional reach. ***The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is superior to that of the States to provide for the welfare or necessities of their inhabitants, however legitimate or dire those necessities may be.***

*Id.* at 29 (internal quotation marks and citations omitted) (emphasis added).

This Petition should be granted to answer the question left open in *Oakland Cannabis* and *Raich* – whether California's Medical Marijuana Law is preempted by the CSA because it is an obstacle to the

accomplishment of the purposes and objectives of the CSA.

## ARGUMENT

### I. CALIFORNIA'S MEDICAL MARIJUANA LAW IS AN OBSTACLE TO THE ACCOMPLISHMENT OF THE PURPOSES AND OBJECTIVES OF THE CSA, AND IS THEREFORE PREEMPTED

"[I]t has been settled that state law that conflicts with federal law is without effect." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (internal quotation marks and citation omitted). A state law conflicts with a federal law, and is therefore preempted under the Supremacy Clause, if ***either*** "it is impossible for a private party to comply with both state and federal requirements or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English v. General Electric Co.*, 496 U.S. 72, 79 (1990) (internal quotation marks and citations omitted).

#### A. The Medical Marijuana Law Is An Obstacle.

The Medical Marijuana Law is preempted because it is an obstacle to the accomplishment of the purposes and objectives of the CSA.

When it enacted the CSA, Congress sought to eradicate the use of certain drugs, including marijuana, and made an explicit determination that marijuana has "no currently accepted medical use in treatment in the United States." 21 U.S.C. §§ 812(b)(1)(B), 812(c)(sched. I)(c)(10).

In 1996, California became the first state to authorize individuals to use marijuana for medical purposes – conduct that violates the CSA. Since then, twelve other states have passed laws legalizing marijuana use. Those states are Alaska, Colorado, Hawaii, Maine, Michigan, Montana, Nevada, New Mexico, Oregon, Rhode Island, Vermont and Washington. Andrew King, Comment, *What the Supreme Court Isn't Saying About Federalism, the Ninth Amendment, and Medical Marijuana*, 59 Ark. L. Rev. 755, 756 n.11 (2006); http://www.mlive.com/politics/index.ssf/2008/11/michigan_voters_approve_medica.html.

There can be no doubt that the Medical Marijuana Law virtually guarantees that more individuals will use marijuana, severely hampering Congress' goal of eradicating all marijuana use. If a state government authorizes a citizen to use marijuana to treat a medical condition, that citizen will be more likely to ignore the federal government's dictate that marijuana cannot be used for any reason.

The Medical Marijuana Law also virtually guarantees that more individuals will use marijuana for purely recreational use. It is inevitable that marijuana originally grown for medicinal use will fall into

the hands of recreational drug users. As this Court discussed in *Raich*, in enacting the CSA "Congress was particularly concerned with the need ***to prevent the diversion of drugs from legitimate to illicit channels.***" 545 U.S. at 12-13 (footnotes omitted) (emphasis added). See also H.R. Rep. No. 91-1444, *reprinted in* 1970 U.S.C.C.A.N. 4566 at 4572 ("Such a closed system should significantly reduce ***the widespread diversion of these drugs out of legitimate channels into the illicit market***. . . .") (emphasis added). To effectuate its objectives, "Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA." *Raich,* 545 U.S. at 13 (citation omitted).

Thus, even if the "medicinal" use of marijuana did not conflict with Congress' goal of eradicating marijuana use, it is inevitable that the Medical Marijuana Law will result in marijuana cultivated and possessed for medical purposes being diverted and used for recreational purposes. *Id.* at 31-32 ("The exemption for cultivation by patients and caregivers can only increase the supply of marijuana in the California market. The likelihood that all such production will promptly terminate when patients recover or will precisely match the patients' medical needs during their convalescence seems remote; ***whereas the danger that excesses will satisfy some of the admittedly enormous demand for recreational use seems obvious.***") (footnotes omitted) (emphasis added).

Further, unscrupulous caregivers and patients will give or sell marijuana to non-patients who will use marijuana for recreational use. In addition, dried marijuana or live marijuana plants may be stolen and used for recreational purposes. The large supply of marijuana available under the Medical Marijuana Law conflicts with Congress's goal to "prevent the diversion of drugs from legitimate to illicit channels." *Id.* at 12-13.

In addition, recreational drug users will exploit the Medical Marijuana Law in order to obtain a marijuana recommendation from a doctor when such a recommendation is not warranted. This further undermines the accomplishment of the purposes and objectives of the CSA.

### 1. The CSA Regulates The Medicinal Use Of Marijuana.

The California Court of Appeal concluded that "the identification card laws do not pose a significant impediment to specific federal objectives embodied in the CSA [because] [t]he purpose of the CSA is to combat recreational drug use, not to regulate a state's medical practice." (App. at 37) (*citing Oregon*, 546 U.S. at 270-272). The Court of Appeal relied on a false dichotomy.

The CSA clearly regulates the ability of doctors and patients to use marijuana for "medical" purposes. Congress has declared that marijuana has no acceptable medical use. 21 U.S.C. §§ 812(b)(1)(B), 812(c)

(sched. I)(c)(10). Therefore, "patients" cannot use, and doctors cannot prescribe marijuana for "medical" purposes. To the extent that state laws provide otherwise, Congress intended to displace those laws when it enacted the CSA.

Indeed, if there is a presumption against preemption because states have traditionally regulated the practice of medicine and determined which substances to make illegal, that presumption has been overcome by the plain terms of the CSA and its legislative history. This Court indicated in *Raich* and *Oregon* that when it comes to the medicinal use of marijuana, Congress has set uniform national standards that displace contrary state laws.

In *Oregon*, this Court stated that "[e]ven though regulation of health and safety is primarily, and historically, a matter of local concern, ***there is no question that the Federal Government can set uniform national standards in these areas***." *Id.* at 271 (internal quotation marks and citation omitted).[6] In support of this statement, the Court cited

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[6] In *Oregon*, the Court also stated that "we have not considered the extent to which the CSA ***regulates medical practice*** beyond prohibiting a doctor from acting as a drug pusher instead of a physician." 546 U.S. at 269 (internal quotation marks and citation omitted) (emphasis added). Following this statement, the Court cited two cases, *United States v. Moore*, 423 U.S. 122 (1975) and *Oakland Cannabis Buyers' Cooperative*. As to the second case, the Court stated that "[i]n *United States v. Oakland Cannabis Buyers' Cooperative*, ***Congress' express determination that marijuana had no***

(Continued on following page)

*Raich*, where the Court concluded that Congress' decision to prohibit the possession, cultivation and transportation of marijuana for medical purposes was constitutional, even though California's Medical Marijuana Law authorized individuals to engage in this conduct. According to the Court in *Raich*,

> [t]he fact that marijuana is used for personal medical purposes on the advice of a physician cannot itself serve as a distinguishing factor. The CSA designates marijuana as contraband for *any* purpose; in fact, by characterizing marijuana as a Schedule I drug, Congress expressly found that the drug has no acceptable medical uses.

545 U.S. at 27 (internal quotation marks and citation omitted).

Under the Supremacy Clause, California must follow the uniform national standards set by Congress regarding the medical use of marijuana. Because California has not followed those standards, its Medical Marijuana Law is preempted.

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***accepted medical use foreclosed any argument about statutory coverage of drugs available by a doctor's prescription***." *Oregon*, 546 U.S. at 269 (emphasis added). Thus, the Court indicated that it did consider how the CSA regulates ***medical practice*** in *Oakland Cannabis* and determined that Congress' express determination that marijuana has no medically accepted use "foreclosed any argument" that states could authorize doctors to prescribe marijuana because of the direct conflict with the CSA.

### 2. Retention Of Federal Authority To Prosecute Is Not Enough To Avoid A Conflict.

The fact that federal officials can still charge California residents who use marijuana for medical purposes with violating the CSA does not eliminate the conflict. The purpose of the CSA is not to prosecute individuals for violating the Act, but to prevent individuals from engaging in certain conduct – unauthorized use of specific drugs. The fact that California has authorized individuals to use marijuana for medical purposes makes it more likely that individuals will engage in conduct (using marijuana) that Congress sought to prevent.

### 3. The Medical Marijuana Law Goes Beyond Merely Decriminalizing Conduct Under State Law.

The State has argued that the Medical Marijuana Law merely exempts individuals from prosecution under California's criminal laws. The Medical Marijuana Law does much more. It specifically authorizes individuals to use marijuana for medical purposes and requires counties to issue identification cards that facilitate the use of marijuana.[7]

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[7] Only one provision of the statute actually exempts individuals from prosecution under California law, and the County does not challenge that provision. Cal. Health & Safety Code § 11362.5(d).

It is one thing for a state to indicate that certain conduct does not violate state law even though that conduct violates federal law. It is quite another thing for a state to specifically authorize individuals to engage in conduct that violates federal law and to require local governments to issue cards that facilitate the federal law violations.

For these reasons, California's Medical Marijuana Law is an obstacle to the accomplishment of the purposes and objectives of the CSA and is therefore preempted.

## II. THE COURT OF APPEAL ERRED IN CONCLUDING THAT THE OBSTACLE PREEMPTION TEST DOES NOT APPLY

The California Court of Appeal held that the Medical Marijuana Law is preempted only if it is impossible to comply with both the CSA and the Medical Marijuana Law at the same time. Nonetheless, the court also indicated that if the "obstacle" preemption test were applied, the County's challenge would still fail.

The Court of Appeal erred in holding that there is a conflict warranting invalidation of the Medical Marijuana Law under the Supremacy Clause only if it is impossible to comply with both the Medical Marijuana Law and the CSA simultaneously. The Court of Appeal's ruling was based primarily on the CSA's express preemption clause, which provides that state laws are preempted if "there is a positive

conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together." 21 U.S.C. § 903.[8]

It is apparent that the plain meaning of "positive conflict" is not "impossibility." Indeed, the Court of Appeal cited no legislative history supporting its interpretation of the CSA's express preemption clause. Moreover, it defies logic to assume that Congress included the preemption clause because it was concerned that states would enact laws ***requiring*** their citizens to use controlled substances banned by the CSA. However, this is the only circumstance under which a state law would be preempted under the Court of Appeal's analysis.

The Court of Appeal also stated that the County's "proffered construction effectively reads the term 'positive' out of section 903, which transgresses the interpretive canon that we should accord meaning to every term and phrase employed by Congress." (App. at 33) (citation omitted). The Court of Appeal's statement is not accurate and its analysis does not withstand scrutiny. The phrases "positive conflict" and "direct conflict" have been used interchangeably with the word "conflict" and refer to the fact that state laws are preempted if either (1) "it is impossible for a private party to comply with both state and federal

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[8] Since California has authorized individuals to engage in conduct that violates the CSA, there is a "positive conflict" and the Medical Marijuana Law is also expressly preempted.

law" ***or*** (2) the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby,* 530 U.S. at 372-373. Drafters often use two words to describe something when one word would have been sufficient. Drafters will say that something is "null and void" when one word or the other would have been sufficient. In the phrase "last, best and final," there is no difference between "last" and "final." There is simply no difference between a "positive conflict" and a "conflict" and the County's proffered interpretation does not alter the substance of section 903. Moreover, the County's interpretation is consistent with the rule of statutory construction that requires words to be read in context. The express preemption clause itself provides the definition of "positive conflict": the state and federal provisions "cannot consistently stand together." A state statute that sanctions and facilitates conduct cannot consistently stand together with a federal statute that directly prohibits the same conduct.

Further, in effect, the Court of Appeal determined that by including the express preemption clause, Congress intended for states to be able to enact laws that conflict with the accomplishment of the purposes and objectives of Congress. Strong evidence of congressional intent should be required before a court presumes that Congress had such an illogical goal in mind. *Geier*, 529 U.S. at 871-872 ("Why, in any event, would Congress not have wanted ordinary preemption principles to apply where an actual conflict

with a federal objective is at stake? Some such principle is needed. In its absence, state law could impose legal duties that would conflict directly with federal regulatory mandates. . . . Insofar as petitioners' argument would permit common-law actions that actually conflict with federal regulations, it would take from those who would enforce a federal law the very ability to achieve the law's congressionally mandated objectives that the Constitution, through the operation of ordinary pre-emption principles, seeks to protect. . . . [Petitioners' argument] permits that law to defeat its own objectives, or potentially, as the Court has put it before, to destroy itself. We do not claim that Congress lacks the constitutional power to write a statute that mandates such a complex type of state/federal relationship. But there is no reason to believe Congress has done so here.") (citations and internal quotation marks omitted).

Moreover, this Court has held that even if a state law is not preempted by an express preemption provision it is preempted if it is an obstacle to the accomplishment of the purposes and objectives of Congress. For instance, in *Geier*, the Court found that the express preemption clause contained in a federal law did not preempt the state law at issue. Nonetheless, the Court held that the implied preemption doctrine must still be applied and therefore courts must determine whether the state law stands as an obstacle to the accomplishment of the purposes and objectives of the federal law. *Geier*, 529 U.S. at

869-874. The Court explained that an "express pre-emption provision imposes no unusual 'special burden' against pre-emption." *Id.* at 873. This Court found the state law preempted because it was an obstacle to the accomplishment of the purposes and objectives of the federal law. *Id.* at 874-886; *accord Buckman*, 531 U.S. at 352 ("To the extent respondent posits that anything other than our ordinary pre-emption principles apply under these circumstances, that contention must fail in light of our conclusion last Term in *Geier* . . . that ***neither an express pre-emption provision nor a saving clause bars the ordinary working of conflict pre-emption principles***.") (citation and internal quotation marks omitted) (emphasis added); *Sprietsma*, 537 U.S. at 65 ("Congress' ***inclusion of an express pre-emption clause does not bar the ordinary working of conflict pre-emption principles***, that find implied pre-emption where it is impossible for a private party to comply with both state and federal requirements, or ***where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress***.") (citation and internal quotation marks omitted) (emphasis added).

For these reasons, the Court of Appeal erred in concluding that the proper preemption test is

whether it is impossible to comply with both the CSA and the Medical Marijuana Law simultaneously.[9]

## III. THE COURT OF APPEAL ERRED IN REFUSING TO OFFICIALLY DECIDE WHETHER THE PROVISIONS OF THE MEDICAL MARIJUANA LAW AUTHORIZING INDIVIDUALS TO USE MARIJUANA FOR MEDICAL PURPOSES ARE PREEMPTED BY THE CSA

The County has standing to challenge all of the provisions of the Medical Marijuana Law at issue in this lawsuit. In order to establish standing under Article III of the United States Constitution, there must be a "case or controversy." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). In order to show that a case or controversy exists, a plaintiff must first "demonstrate that he has suffered an 'injury in fact.'" *Id.* The Court of Appeal correctly recognized that if the County were required to issue identification cards pursuant to a state law that is preempted, the County would suffer injury in fact. However, the Court of Appeal erred when it failed to consider the County's argument why it cannot be required to issue the identification cards – because California cannot authorize individuals to use marijuana for medical

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[9] The logic of this conclusion is further undermined by the fact that the only way to "comply" with both laws is to abstain from any conduct authorized by the Medical Marijuana Law.

purposes. Such authorization conflicts with the CSA, which prohibits marijuana use for any purpose.

Prior to the filing of this action, San Diego NORML sent a letter to the County threatening to file a lawsuit seeking a writ of mandate/injunction requiring the County to issue identification cards to medical marijuana users and caregivers as required by the Medical Marijuana Law. (C.T., Vol. I, at 9). Under a recent California Supreme Court decision, the County would not have been able to raise the unconstitutionality of the Medical Marijuana Law as a defense in a writ of mandate action seeking an order compelling the County to issue the identification cards. *Lockyer v. City and County of San Francisco*, 33 Cal.4th 1055, 1086-1087 (2003) (holding that a local government cannot raise the unconstitutionality of a state law as a defense to a lawsuit seeking an order requiring the local government to comply with the state law; instead the local government must seek a declaration from a court that the state law is unconstitutional before refusing to obey it).

Therefore, the County filed this action seeking a declaration that California's Medical Marijuana Law is preempted by the CSA and consequently, the County does not have a duty to issue the identification cards. The San Diego County Superior Court considered the merits of the County's argument. (App. at 53). The Court of Appeal correctly recognized that the County has standing to challenge the statutory provisions requiring the County to issue identification cards. Cal. Health & Safety Code

§ 11362.71(b)(5). However, the California Court of Appeal refused to consider the County's primary reason why it could not be required to issue the identification cards – because California cannot authorize individuals to engage in conduct – using marijuana – that violates federal law. The California Court of Appeal's determination was clear error.

It is apparent that the key issue presented in this case is whether the provisions of the Medical Marijuana Law, which authorize individuals to engage in conduct that violates the CSA, are preempted. It is equally apparent that the validity of the statutory provisions requiring counties to issue identification cards to medical marijuana users and caregivers is dependent on the answer to that key issue.

This is true because if a court were to determine that the Medical Marijuana Law's authorization of marijuana use is preempted by the CSA, no one could successfully argue that the State could require the County to issue cards identifying individuals authorized to use marijuana for medical purposes. The converse is also true. If a court were to decide that the State can legally authorize individuals to use marijuana, it would be virtually impossible for the County to successfully argue that the identification card requirement is illegal. Thus, the underlying question whether California can legally authorize individuals to use marijuana in violation of federal law is the key issue in determining whether the State can require the County to issue the identification

cards. The Court of Appeal should have answered that question.

The legality of the identification cards cannot be meaningfully analyzed in a vacuum. The cards have legal significance only in statutory context. By refusing to answer the question whether California can authorize individuals to use marijuana for medical purposes, the Court of Appeal virtually guaranteed that the identification card requirement would be found not preempted. The Court of Appeal effectively assumed – but refused to officially decide – that the provisions authorizing the use of marijuana for medical purposes were lawful. Therefore, it was easy for the Court of Appeal to conclude that the identification cards alone do not pose an obstacle to the accomplishment of the purposes and objectives of the CSA because the cards are plastic inanimate objects that merely identify individuals who the Court of Appeal assumed California could legally authorize to use marijuana.

However, the Court of Appeal should have officially answered the question whether California's authorization of individuals to use marijuana for medical purposes is preempted by the CSA. If the answer to this question is yes, then the counties cannot be required to issue the identification cards. If the answer is no, then the counties probably can be required to issue the cards.

Instead of answering the critical question, the Court of Appeal noted that the provisions authorizing

individuals to use marijuana for medical purposes "arguably undermine[ ] the goals of or [are] inconsistent with the CSA," but nonetheless effectively assumed that those provisions were valid. (App. at 37). This was error.

The County does have standing to challenge those provisions of the Medical Marijuana Law that authorize individuals to use marijuana for medical purposes because their validity necessarily determines whether the identification card requirement, which the Court of Appeal found the County has standing to challenge, is valid.

The error in the Court of Appeal's analysis can be demonstrated by a simple example. Congress could pass a law making it a federal crime to assassinate the President of the United States. California could pass a law authorizing certain citizens to assassinate the President. The same law could also require counties to issue cards identifying those individuals who California had authorized to assassinate the President. A court deciding a preemption challenge to the identification card requirement would logically have to first consider whether California law could authorize someone to assassinate the President when such conduct violates federal law. The answer to this question would determine the outcome of the preemption challenge to the identification card requirement. The same is true in this case.

### A. If The County Does Not Have Standing To Challenge The Provisions That Authorize The Use Of Marijuana For Medical Purposes, These Provisions Will Go Unchallenged.

If the County does not have standing to challenge the provisions of the Medical Marijuana Law authorizing individuals to use marijuana, then no one will have standing to challenge these provisions.

No citizens adversely affected by California's unconstitutional Medical Marijuana Law would have a sufficient interest in the outcome of the litigation necessary to confer standing. Citizens claiming that the Medical Marijuana Law is preempted would not be able to show they personally are harmed by other people's use of marijuana for medical purposes.

Further, citizens who are arrested for possessing marijuana for medical purposes, or who are denied an identification card by the County, would not challenge the validity of the provisions of the Medical Marijuana Law authorizing marijuana use.

The State has previously asserted that the federal government could bring a preemption challenge to the Medical Marijuana Law. However, the United States is not required to take any action under the state law. The United States does not have to issue identification cards to those who want to use marijuana for medical purposes. Further, the United States can, and has, prosecuted individuals for violating the CSA despite California's conflicting laws.

*United States v. Alden*, 2005 U.S. App. LEXIS 15633 (9th Cir. 2005); *Raich*, 545 U.S. 1. Thus, the United States would not have a sufficient interest in the outcome of this litigation in order to confer standing.[10]

For these reasons, the Court of Appeal erred in not officially deciding whether the Medical Marijuana Law is preempted by the CSA.

## CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

DATED: January 12, 2009

Respectfully submitted,

JOHN J. SANSONE, County Counsel

THOMAS D. BUNTON, Senior Deputy
*Attorneys for Petitioner*

[10] If the federal government were the only entity with standing to challenge the Medical Marijuana Law, it would undermine democratic principles. Citizens and governments within California should have the right to challenge laws enacted by their own Legislature. Californians should be able to police the actions of their Legislature and not have to rely on the federal government to do so.

CERTIFIED FOR PUBLICATION

COURT OF APPEAL,
FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

| | |
|---|---|
| COUNTY OF SAN DIEGO et al.,<br>Plaintiffs and Appellants,<br>v.<br>SAN DIEGO NORML et al.,<br>Defendants and Respondents;<br>WENDY CHRISTAKES et al.,<br>Interveners and Respondents. | D050333<br>(Super. Ct. Nos. GIC860665, GIC861051)<br>(Filed Jul. 31, 2008) |

APPEAL from a judgment of the Superior Court of San Diego County, William R. Nevitt, Jr., Judge. Affirmed.

John J. Sansone, County Counsel (San Diego), Thomas D. Bunton and C. Ellen Pilsecker, Deputy County Counsel, for Plaintiff and Appellant County of San Diego.

Ruth E. Stringer, County Counsel (San Bernardino), Alan L. Green, Charles J. Larkin and Dennis Tilton, Deputy County Counsel, for Plaintiffs and Appellants County of San Bernardino and Gary Penrod.

American Civil Liberties Union Foundation, Adam B. Wolf, Allen Hopper; ACLU of San Diego & Imperial Counties and David Blair-Loy for Defendants and Respondents San Diego NORML, Wo/Men's Alliance for Medical Marijuana and Dr. Stephen O'Brien.

Edmund G. Brown, Jr., Attorney General, Christopher E. Krueger, Assistant Attorney General, Jonathan K. Renner and Peter A. Krause, Deputy Attorneys General, for Defendants and Respondents State of California and Sandra Shewry.

Americans for Safe Access and Joseph D. Elford for Interveners and Respondents Wendy Christakes, Norbert Litzinger, William Britt, Yvonne Westbrook and Americans for Safe Access.

In 2003, the California Legislature enacted the Medical Marijuana Program Act. (Health & Saf. Code, §§ 11362.7-11362.9, hereafter MMP.)[1] Among other provisions, the MMP imposed on counties the obligation to implement a program permitting a limited group of persons – those who qualify for exemption from California's statutes criminalizing certain conduct with respect to marijuana (the exemptions) – to apply for and obtain an identification card verifying their exemption.

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[1] All statutory references are to the Health and Safety Code unless otherwise specified.

In this action, plaintiffs County of San Diego (San Diego) and County of San Bernardino (San Bernardino) contend that, because the federal Controlled Substances Act (21 U.S.C. §§ 801-904, hereafter CSA) prohibits possessing or using marijuana for any purpose, certain provisions of California's statutory scheme are unconstitutional under the Supremacy Clause of the United States Constitution. San Diego and San Bernardino (together Counties) did not claim below, and do not assert on appeal, that the exemption from state criminal prosecution for possession or cultivation of marijuana provided by California's Compassionate Use Act of 1996 (§ 11362.5, hereafter CUA) is unconstitutional under the preemption clause. Instead, Counties argue the MMP is invalid under preemption principles, arguing the MMP poses an obstacle to the congressional intent embodied in the CSA.

The trial court below rejected Counties' claims, concluding the MMP neither conflicted with nor posed an obstacle to the CSA. On appeal, Counties assert the trial court applied an overly narrow test for preemption, and the MMP is preempted as an obstacle to the CSA. We conclude Counties have standing to challenge only those limited provisions of the MMP that impose specific obligations on Counties, and may not broadly attack collateral provisions of California's laws that impose no obligation on or inflict any particularized injury to Counties. We further conclude, as to the limited provisions of the MMP that Counties *may* challenge, those provisions do not positively

conflict with the CSA, and do not pose any added obstacle to the purposes of the CSA not inherent in the distinct provisions of the exemptions from prosecution under California's laws, and therefore those limited provisions of the MMP are not preempted. We also reject San Bernardino's claim that the identification card provisions of the MMP are invalid under the California Constitution.

## I

## THE STATUTORY FRAMEWORK

### A. California Law

*The CUA*

In California, marijuana is classified as a Schedule I controlled substance (*see* § 11054, subd. (d)(13)), and its possession is generally prohibited. However, when California voters adopted the CUA, California adopted an exemption from state law sanctions for medical users of marijuana. The CUA, codified in section 11362.5, provides:

> "(b)(1) The people of the State of California hereby find and declare that the purposes of the [CUA] are as follows:
>
> "(A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the

treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.

"(B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.

"(C) To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.

"(2) Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes.

"(c) Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes.

"(d) Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

> "(e) For the purposes of this section, 'primary caregiver' means the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person."

*The MMP*

In 2003, the Legislature enacted the MMP to "address issues not included in the CUA." (*People v. Wright* (2006) 40 Cal.4th 81, 85.) Among the MMP's purposes was to "'facilitate the prompt identification of qualified patients and their designated primary caregivers in order to avoid unnecessary arrest and prosecution of these individuals and provide needed guidance to law enforcement officers.'" (*Id.* at p. 93.) To that end, the MMP included provisions establishing a voluntary program for the issuance of identification cards to persons qualified to claim the exemptions provided under California's medical marijuana laws. (§§ 11362.7, subd. (f), 11362.71.) Participation in the identification card program, although not mandatory, provides a significant benefit to its participants: they are not subject to arrest for violating California's laws relating to the possession, transportation, delivery or cultivation of marijuana, provided they meet the conditions outlined in the MMP. (§ 11362.71, subd. (e).)

Although the bulk of the provisions of the MMP confer no rights and impose no duties on counties,[2] one set of provisions under the MMP – the program for issuing identification cards to qualified patients and primary caregivers – does impose certain obligations on counties. (§ 11362.71 et seq.) Under the identification card program, the California Department of Health Services is required to establish and maintain a program under which qualified applicants may voluntarily apply for a California identification card identifying them as qualified for the exemptions; the program is also to provide law enforcement a 24-hour a day center to verify the validity of the state identification card. (§ 11362.71, subd. (a).) The MMP requires counties to provide applications to applicants, to receive and process the applications, verify

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[2] For example, the MMP's exemptions encompass a broad list of specified drug offenses from which qualified patients and primary caregivers would be immune. The MMP provides that exempt persons would not "'be subject, on that sole basis, to criminal liability under Section 11357 [possession of marijuana], 11358 [cultivation of marijuana], 11359 [possession for sale], 11360 [transportation], 11366 [maintaining a place for the sale, giving away or use of marijuana], 11366.5 [making available premises for the manufacture, storage or distribution of controlled substances], or 11570 [abatement of nuisance created by premises used for manufacture, storage or distribution of controlled substance].' (§ 11362.765, subd. (a).)" (*People v. Wright, supra,* 40 Cal.4th at p. 93.) The MMP also contains definitional provisions for those entitled to the protections of the MMP (§ 11362.7), imposes obligations on applicants and holders of identification cards (§§ 11362.715, 11362.76, 11362.77, 11362.81), and contains several other miscellaneous provisions.

the accuracy of the information contained on the applications, approve the applications of persons meeting the state qualifications and issue the state identification cards to qualified persons, and maintain the records of the program. (§§ 11362.71-11362.755.)

The identification card program is voluntary and a person need not obtain an identification card to be entitled to the exemptions provided by state law. (§ 11362.765, subd. (b); *People v. Wright, supra,* 40 Cal.4th at pp. 93-94 [the MMP applies to both cardholders and noncardholders].)

B. Federal Law – the CSA

The CSA provides it is "unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice. . . ." (21 U.S.C. § 844(a).) The exception regarding a doctor's prescription or order does not apply to any controlled substance Congress has classified as a Schedule I drug (*see* 21 U.S.C. § 812(c)), including marijuana. (*Gonzales v. Raich* (2005) 545 U.S. 1, 14-15.) Schedule I drugs are so categorized because they have (1) a high potential for abuse, (2) no currently accepted medical use in treatment in the United States, and (3) a lack of accepted safety for use under medical supervision. (21 U.S.C. § 812(b)(1).)

Possession of marijuana for personal use is a federal misdemeanor. (21 U.S.C. § 844a(a).) The legislative intent of Congress to preclude the use of marijuana for medicinal purposes is reflected in the statutory scheme of the CSA:[3] "By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration preapproved research study. [Citations.]" (*Gonzales v. Raich, supra,* 545 U.S. at p. 14.)

Although the use of marijuana for medical purposes has found growing acceptance among the states (*Conant v. Walters* (9th Cir. 2002) 309 F.3d 629, 643 [noting "Alaska, Arizona, Colorado, Maine, Nevada, Oregon and Washington have followed California in enacting medical marijuana laws by voter initiative"]), marijuana remains generally prohibited under the CSA.(*Conant,* at p. 640; *Gonzales v. Raich, supra,* 545 U.S. at p. 15, fn. 23 [efforts to reclassify marijuana to permit medicinal uses have been unsuccessful].)

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[3] Counties also note the United States is a party to a treaty, the Single Convention on Narcotic Drugs, 1961 (*see* 21 U.S.C. § 801(7)), which includes prohibitions on marijuana. However, this treaty is not self-executing, and Counties do not explain how the treaty lends any added weight to the preemption questions presented here.

## II

## PROCEDURAL BACKGROUND

In 2006 San Diego filed a complaint against the State of California and Sandra Shewry, in her former capacity as Director of the California Department of Health Services (together State), as well as the San Diego chapter of the National Organization for the Reform of Marijuana Laws (NORML). San Diego's complaint alleged it had declined to comply with its obligations under the MMP and NORML had threatened to file suit against San Diego for its noncompliance. Accordingly, San Diego sought a judicial declaration that it was not required to comply with the MMP, arguing the entirety of the MMP and the CUA (except for section 11362.5, subsection (d)) was preempted by federal law. San Bernardino filed its suit raising the same preemption claims, and its complaint was subsequently consolidated with that of San Diego. The County of Merced intervened in San Diego's action and alleged, as an additional ground for relief, that the MMP was invalid because it amended the CUA in violation of Article II, section 10, subdivision (c) of the California Constitution.[4] Additional parties, composed of medical marijuana patients and others qualified for exemptions under the CUA and MMP, also intervened in the action.

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[4] County of Merced is not a party to this appeal and its complaint in intervention is not part of the record on appeal. However, we grant State's unopposed motion for judicial notice of County of Merced's complaint in intervention.

State demurred to Counties' complaints, alleging in part that Counties did not have standing to prosecute the claims, but its demurrer was overruled. The parties subsequently filed cross-motions for judgment on the pleadings, which were consolidated for hearing in November 2006. The court ruled the CUA and MMP were not preempted by federal law and the MMP was not invalid under the California Constitution, and entered judgment accordingly. Counties appeal.

## III

## THE STANDING ISSUE

State argues on appeal that Counties do not have standing to assert the CUA and MMP are unconstitutional.[5] State's argument presents two distinct issues. The first issue is whether a political subdivision of California, charged with the ministerial obligation to enforce or carry out state laws, may ever challenge a state enactment as unconstitutional. Must the entity comply with a state law until a court has declared the law unconstitutional, or may it instead bring a declaratory relief action challenging the constitutionality of that law? The second issue, which assumes a local governmental entity *may* challenge a state law

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[5] The issue of standing, raised at trial, is a jurisdictional issue that may be raised at any time notwithstanding the absence of a cross-appeal. (*Citizens for Uniform Laws v. County of Contra Costa* (1991) 233 Cal.App.3d 1468, 1472.)

as unconstitutional, is the extent of its standing. Does the entity have standing to challenge an entire statutory scheme – including those aspects of the scheme that impose no obligations on the entity – or is it limited to challenging only those aspects that impose specific obligations on or inflict particularized injury to the local governmental entity?

A. General Principles

A declaratory relief action requires an "actual controversy relating to the legal rights and duties of the respective parties." (Code Civ. Proc., § 1060.) Courts will decline to resolve lawsuits that do not present a justiciable controversy, and justiciability "involves the intertwined criteria of ripeness and standing." (*California Water & Telephone Co. v. County of Los Angeles* (1967) 253 Cal.App.2d 16, 22.)

"As a general principle, standing to invoke the judicial process requires an actual justiciable controversy as to which the complainant has a real interest in the ultimate adjudication *because he or she has either suffered or is about to suffer an injury of sufficient magnitude* reasonably to assure that all of the relevant facts and issues will be adequately presented to the adjudicator. [Citations.] To have standing, a party must be beneficially interested in the controversy; that is, he or she must have 'some special interest to be served or some particular right to be preserved or protected *over and above the interest held in common with the public at large.*' [Quoting

*Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 796.] The party must be able to demonstrate that he or she has some such beneficial interest that is concrete and actual, and not conjectural or hypothetical." (*Holmes v. California Nat. Guard* (2001) 90 Cal.App.4th 297, 314-315, italics added.)

When a party asserts a statute is unconstitutional, standing is not established merely because the party has been impacted by the statutory scheme to which the assertedly unconstitutional statute belongs. Instead, the courts have stated that "[a]t a minimum, standing means a party must '"show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,". . . .' [Quoting *Valley Forge College v. Americans United* (1982) 454 U.S. 464, 472.] . . . '"[I]t is well-settled law that the courts will not give their consideration to questions as to the constitutionality of a statute unless such consideration is necessary to the determination of a *real and vital controversy between the litigants in the particular case before it.* It is incumbent upon a party to an action or proceeding who assails a law invoked in the course thereof to show that the provisions of the statute thus assailed are applicable to him and that he is injuriously affected thereby." [Citations.]' [Quoting *Worsley v. Municipal Court* (1981) 122 Cal.App.3d 409, 418.]" (*In re Tania S.* (1992) 5 Cal.App.4th 728, 736-737.)

This court's analysis in *Tania S.* demonstrates that a party does not have standing to raise hypothetical constitutional infirmities of a statute when

the statute, as applied to the party, does not occasion any injury to the party. In *Tania S.*, the appellant's children were declared dependents and removed from his custody when the court found, under Welfare and Institutions Code section 300, subdivision (b), that appellant's inability or failure to protect the children created a substantial risk of serious physical harm to them. (*In re Tania S., supra,* 5 Cal.App.4th at pp. 732-733.) The appellant did not challenge the constitutionality of the portion of section 300, subdivision (b), under which the juvenile court made its jurisdictional findings, but instead asserted a second aspect of section 300, subdivision (b) (which cautioned that an allegation of willful failure to provide adequate medical treatment based on religious beliefs required a court to give some deference to the parent's religious practices) improperly created two classes of parents – those who injure their children out of a religious belief and those who injure their children for nonreligious reasons – making the entirety of section 300, subdivision (b), unconstitutional. (*Tania S.*, at pp. 735-736.) This court rejected the appellant's standing to raise the claim because the proceedings were not based on an allegation he did not provide the children adequate medical treatment or provided spiritual treatment through prayer. This court concluded that because the appellant "has not demonstrated he suffered any direct injury resulting from the assertedly unconstitutional portion of [the statute]," "we do not determine the substantive merits of [appellant's] claim the challenged portion of [the statute] is unconstitutional. Such determination will

be made only if the claim is raised by one with standing." (*In re Tania S.*, at pp. 736-737, fn. omitted.)

B. Limitations on Governmental Entities

Plaintiffs here are local governmental entities that sought in the proceedings below, and seek in this appeal, a determination that they are not obligated to comply with their duties under the statutory scheme because the statutory scheme is unconstitutional. We must evaluate the extent to which a local governmental entity of the state may attack the constitutionality of the laws it is obligated to administer.

As a general rule, a local governmental entity "charged with the ministerial duty of enforcing a statute[ ] generally does not have the authority, in the absence of a judicial determination of unconstitutionality, to refuse to enforce the statute on the basis of the [entity's] view that it is unconstitutional." (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1082, fn. omitted.) In *Lockyer,* the court rejected the entity's argument that because the entity believed certain statutes (limiting marriage to a union between a man and a woman) were unconstitutional, it could bring the issue into court by defying state law and issuing licenses to same-sex couples. *Lockyer* noted that, although there may be limited circumstances in which a public entity might refuse to enforce a statute as a means of bringing the constitutionality of the statute before a court for judicial resolution, the exception does not apply when there

exists "a clear and readily available means, other than the officials' wholesale defiance of the applicable statutes, to ensure that the constitutionality of the current marriage statutes would be decided by a court." (*Id.* at p. 1099.) *Lockyer* noted that if the local officials charged with the ministerial duty of issuing marriage licenses and registering marriage certificates believed the state's current marriage statutes are unconstitutional and should be tested in court, "they could have denied a same-sex couple's request for a marriage license and advised the couple to challenge the denial in superior court. *That* procedure – a lawsuit brought by a couple who has been denied a license under existing statutes – is the procedure that was utilized to challenge the constitutionality of California's antimiscegenation statute. . . . The city cannot plausibly claim that the desire to obtain a judicial ruling on the constitutional issue justified the wholesale defiance of the applicable statutes that occurred here." (*Lockyer,* at pp. 1098-1099, fn. omitted.)

However, under some limited circumstances, a public entity threatened with injury by the allegedly unconstitutional operation of an enactment may have standing to raise the challenge in the courts. For example, in *County of Los Angeles v. Sasaki* (1994) 23 Cal.App.4th 1442, one enactment (Sen. Bill No. 1135) reallocated property tax revenues away from the county and to school and community college districts, while a second enactment (Sen. Bill No. 399) affected the formulas for determining the amount of moneys

to be applied by the state for the support of school and community college districts. (*Id.* at pp. 1447-1448.) The court concluded the county could challenge Senate Bill No. 1135's reallocation of funds away from the county. However, the court concluded the county did not have standing to challenge Senate Bill No. 399, stating:

> "Without mentioning [Senate Bill No.] 399, the County alleged in its complaint that the state will use the funds reallocated pursuant to [Senate Bill No.] 1135 to fulfill its responsibilities for the financial support of schools as mandated by Proposition 98. On appeal, the County contends the 'State's action' was invalid because 'it mandated a major shift in the use of local property taxes for a specific State purpose, to fulfill the State's obligation under Proposition 98 to provide a constitutionally prescribed minimum amount of public education funding 'from state revenues.'" Thus, the County seeks to challenge both [Senate Bill No.] 1135 . . . and [Senate Bill No.] 399. . . . [¶] The constitutionality of [Senate Bill No. 399] is not before us on this appeal. This appeal deals only with the reallocation of property tax revenues from local governments and special districts to school and community college districts. The County's concern is with the loss of property tax revenue to it because of the [Senate Bill No.] 1135 reallocation. How the state treats the reallocation in connection with the mandate of California Constitution, article XVI, section 8 (Proposition 98), is of possible concern

> to the educational entities which are beneficiaries of the constitutional mandate, but not the County. In short, there is simply no theory based on Proposition 98 and/or the effect of [Senate Bill No.] 399 upon it, which would, even assuming there were no other obstacles, entitle the County to a writ of mandate compelling compliance with County Ordinance No. 1993-0045, and negating [Senate Bill No.] 1135. The County lacks standing to raise the issue." (*Id.* at p. 1449.)

The other courts that have granted standing to local public entities to raise constitutional challenges to enactments they were otherwise bound to enforce have similarly done so in the limited context of enactments that imposed duties directly on or denied significant rights to the entity itself. (*See, e.g., Star-Kist Foods, Inc. v. County of Los Angeles* (1986) 42 Cal.3d 1, 5-10 [state law provided exemption from local taxation for business inventories of foreign origin; county had standing to assert exemption violated commerce clause "because . . . the agencies experienced significant revenue loss"]; *City of Garden Grove v. Superior Court* (2007) 157 Cal.App.4th 355 [entity asserted materials it seized from medical marijuana user could not be returned because federal preemption principles barred return of marijuana; standing to raise issue recognized because entity had specific duty at issue under the statutory scheme and issue was limited to whether that duty violated preemption principles].) However, the courts have declined to confer standing on the entity to raise

constitutional challenges to enactments that had no direct impact on the entity but instead affected only the entity's constituency. (*See, e.g., City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 59-63 [standing denied where enactment imposed no obligations on entity and only imposed restrictions on officials of entity].)

C. Analysis

State, relying on *Lockyer, supra,* 33 Cal.4th 1055 and *Tania S., supra,* 5 Cal.App.4th 728, argues that because Counties have suffered no cognizable injury from the exemptions for medical marijuana users provided by the MMP or CUA, the action should be dismissed because Counties' "mere dissatisfaction with . . . or disagreement with [state] policies does not constitute a justiciable controversy" and does not confer standing on Counties to raise constitutional complaints about the MMP or CUA. (*Zetterberg v. State Dept. of Public Health* (1974) 43 Cal.App.3d 657, 662.) Counties, relying on *Star-Kist Foods, Inc. v. County of Los Angeles, supra,* 42 Cal.3d 1 and *City of Garden Grove v. Superior Court, supra,* 157 Cal.App.4th 355, assert they have standing because they will suffer harm – by being required to establish and operate the apparatus to process and issue

identification cards – from statutory obligations they argue are preempted by the CSA.[6]

The standing principles distilled from the cases convince us Counties do not have standing to challenge those portions of the MMP and CUA that are not applicable to them and that do not injuriously affect them. (*In re Tania S., supra,* 5 Cal.App.4th at 737.) Accordingly, because major portions of the MMP and CUA neither impose obligations on nor inflict direct injury to Counties, we reject Counties' effort to obtain an advisory opinion declaring the *entirety* of the MMP and the bulk of the CUA are invalid under preemption principles.[7] However, because limited

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[6] Counties, citing *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432 and *Harman v. City and County of San Francisco* (1972) 7 Cal.3d 150, appear also to assert that standing exists when the party has a sufficient interest in the litigation to ensure the matter will be prosecuted with vigor. However, these cases did not hold a person willing to litigate a claim intensely acquires standing that is otherwise absent, and we are not aware of any case law suggesting that a willingness to fervently pursue a cause is the sine qua non of standing to litigate that cause.

[7] Our decision to limit Counties' constitutional challenge to those portions of the CUA and MMP that directly affect them is consonant with "[w]ell-settled principles of judicial restraint [that establish] when a case must be decided upon constitutional grounds, a court should strive to resolve the matter as narrowly as possible, and should avoid expansive constitutional pronouncements that inevitably prejudge future controversies and may have unforeseen and questionable consequences in other contexts. [Citations.]" (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 116 [conc. opn. of George, J.].) This principle of jurisprudential restraint cautions against deciding broad

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portions of the MMP – i.e. those statutes requiring counties to adopt and operate the identification card system – *do* impose obligations on Counties, which obligations would be obviated were those statutes preempted by federal law, we conclude Counties have standing to raise preemption claims insofar as the MMP establishes the identification card system. Accordingly, we reach Counties' preemption arguments as to those statutes, and *only* those statutes, that require Counties to implement and administer the identification card system.[8]

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constitutional questions raised, as here, by persons not injuriously affected by the challenged statute. (See generally *Longval v. Workers' Comp. Appeals Bd.* (1996) 51 Cal.App.4th 792, 802.)

[8] Specifically, we examine Counties' preemption claims only as to sections 11362.71, subdivision (b) (requiring counties to administer the identification card system established by the Department of Health Services), 11362.72 (specifying counties' obligations upon receipt of application for identification card), 11362.735 (specifying contents of identification card issued by counties), 11362.74 (specifying grounds and procedures for denying application), 11362.745 (specifying renewal procedures for cards), and section 11362.755 (permitting counties to establish fees to defray cost of administering system), which impose obligations on Counties. We conclude Counties do not have standing to challenge (and therefore we do not evaluate) whether the remaining sections, and in particular sections 11362.5, subdivision (d), and 11362.765 (providing specified persons with exemptions from state law penalties for specified offenses), are preempted by the CSA.

## IV

## THE PREEMPTION ISSUE

### A. General Principles

Principles of preemption have been articulated by numerous courts. "'The supremacy clause of article VI of the United States Constitution grants Congress the power to preempt state law. State law that conflicts with a federal statute is "'without effect.'" [Citations.] It is equally well established that "[c]onsideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'" [Citation.] Thus, "'"[t]he purpose of Congress is the ultimate touchstone"'" of pre-emption analysis." [Citation.]'" (*Jevne v. Superior Court* (2005) 35 Cal.4th 935, 949.)

The California Supreme court has identified "four species of federal preemption: express, conflict, obstacle, and field. [Citation.] [¶] First, express preemption arises when Congress 'define[s] explicitly the extent to which its enactments pre-empt state law. [Citation.] Pre-emption fundamentally is a question of congressional intent, [citation], and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one.' [Citations.] Second, conflict preemption will be found when simultaneous compliance with both state and federal directives is impossible. [Citations.] Third, obstacle preemption arises when '"under the circumstances of

[a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."' [Citations.] Finally, field preemption, i.e., 'Congress' intent to pre-empt all state law in a particular area,' applies 'where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation.' [Citations.]" (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 935-936, fn. omitted (*Viva!*).)

The parties agree, and numerous courts have concluded, Congress's statement in the CSA that "[n]o provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter" (21 U.S.C. § 903) demonstrates Congress intended to reject express and field preemption of state laws concerning controlled substances. (See, e.g., *People v. Boultinghouse* (2005) 134 Cal.App.4th 619, 623 [21 U.S.C. § 903's "express statement by Congress that the federal drug law does *not* generally preempt state law gives the usual assumption against preemption additional force"]; *Gonzales v. Oregon* (2006) 546 U.S. 243, 289 [dis. opn. of Scalia, J.] [characterizing section 903 as a "nonpre-emption clause"]; *City of Hartford v. Tucker* (Conn. 1993) 621 A.2d 1339, 1341 [describing 21 U.S.C. § 903 and "the antipreemption

provision of the Controlled Substances Act"].) When Congress has expressly described the scope of the state laws it intended to preempt, the courts "infer Congress intended to preempt no more than that absent sound contrary evidence." (*Viva!, supra,* 41 Cal.4th at p. 945.)

B. Conflict and Obstacle Preemption

Although the parties agree that neither express nor field preemption apply in this case, they dispute whether title 21 United States Code section 903 signified a congressional intent to displace only those state laws that positively conflict with the provisions of the CSA, or also signified a congressional intent to preempt any laws posing an obstacle to the fulfillment of purposes underlying the CSA.

*Conflict Preemption*

Conflict preemption will be found when "simultaneous compliance with both state and federal directives is impossible." (*Viva!, supra,* 41 Cal.4th at 936.) In *Southern Blasting Services v. Wilkes County, NC* (4th Cir. 2002) 288 F.3d 584, the court construed the effect of a federal preemption clause substantively identical to title 21 United States Code section 903.[9]

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[9] The preemption clause evaluated by the *Southern Blasting* court provided that, "No provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the

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In rejecting the plaintiffs' argument that the local ordinances were invalid because they were in "direct and positive conflict" with the federal law, the *Southern Blasting* court concluded that "[t]he 'direct and positive conflict' language in 18 U.S.C. § 848 simply restates the principle that state law is superseded in cases of an actual conflict with federal law such that 'compliance with both federal and state regulations is a physical impossibility.' [Quoting *Hillsborough County v. Automated Medical Labs.* (1985) 471 U.S. 707, 713]. Indeed, § 848 explains that in order for a direct and positive conflict to exist, the state and federal laws must be such that they 'cannot be reconciled or consistently stand together.'" (*Southern Blasting, supra,* at p. 591; accord *Florida Avocado Growers v. Paul* (1963) 373 U.S. 132, 142-143 [state law preempted where "compliance with both federal and state regulations is a physical impossibility"].)

Congress has the power to permit state laws that, although posing some obstacle to congressional goals, may be adhered to without requiring a person affirmatively to violate federal laws. (*Geier v. American Honda Motor Co.* (2000) 529 U.S. 861, 872 [dicta].) In *Gonzales v. Oregon, supra,* 546 U.S. 243, the court considered whether the CSA, by regulating controlled substances and making some substances

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exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together." (18 U.S.C. § 848.)

available only pursuant to a prescription by a physician "issued for a legitimate medical purpose" (21 C.F.R. § 1306.04(a)), permitted the federal government to effectively bar Oregon's doctors from prescribing drugs pursuant to Oregon's assisted suicide law by issuing a federal administrative rule (the Directive) that use of controlled substances to assist suicide is not a legitimate medical practice and dispensing or prescribing them for this purpose is unlawful under the CSA. The majority concluded the CSA's preemption clause showed Congress "explicitly contemplates a role for the States in regulating controlled substances" (*Gonzales v. Oregon,* at p. 251), including permitting the states latitude to continue their historic role of regulating medical practices. In dissent, Justice Scalia concluded title 21 United States Code section 903 was "embarrassingly inapplicable" to the majority's preemption analysis because the preemptive impact of section 903 reached only state laws that affirmatively mandated conduct violating federal laws. (*Gonzales v. Oregon, supra,* 546 U.S. at p. 289, dis. opn. of Scalia, J.)[10] Thus, it

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[10] Justice Scalia explained that title 21 United States Code section 903 only "affirmatively *prescrib[ed]* federal pre-emption whenever state law creates a conflict. In any event, the Directive does not purport to pre-empt state law in any way, not even by conflict pre-emption – unless the Court is under the misimpression that some States *require* assisted suicide. The Directive merely interprets the CSA to prohibit, like countless other federal criminal provisions, conduct that happens not to be forbidden under state law (or at least the law of the State of

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appears Justice Scalia's interpretation suggests a state law is preempted by a federal "positive conflict" clause, like 21 U.S.C. section 903, only when the state law affirmatively requires acts violating the federal proscription.

*Obstacle Preemption*

Obstacle preemption[11] will invalidate a state law when "'"under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."' [Citations.]" (*Viva!, supra,* 41 Cal.4th at p. 936.) Under obstacle preemption, whether a state law presents "a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects: [¶] 'For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of

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Oregon)." (*Gonzales v. Oregon, supra,* 546 U.S. at pp. 289-290, dis. opn. of Scalia, J.)

[11] The parties dispute whether obstacle preemption is merely an alternative iteration of conflict preemption, or whether obstacle preemption requires an analytical approach distinct from conflict preemption. Our Supreme Court, although recognizing that the courts have often "group[ed] conflict preemption and obstacle preemption together in a single category" (*Viva!, supra,* at pp. 935-936, fn. 3), has concluded the two types of preemption are "analytically distinct and may rest on wholly different sources of constitutional authority [and] we treat them as separate categories. . . ." (*Ibid.*)

course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished – if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect – the state law must yield to the regulation of Congress within the sphere of its delegated power.'" (*Crosby v. National Foreign Trade Council* (2000) 530 U.S. 363, 373.)

C. The State Identification Card Laws and Preemption

The parties below disputed the effect of the language of title 21 United States Code section 903, which provides:

> "No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, *unless there is a positive conflict* between that provision of this subchapter and that State law *so that the two cannot consistently stand together.*" (Italics added.)

In the proceedings below, State and other respondents contended this language evidenced a congressional intent to preempt only those state laws in direct and positive conflict with the CSA so that compliance with both the CSA and the state laws is

impossible. Counties asserted this language was merely intended to eschew express and field preemption and should be construed as declaring Congress's intent to preempt any state laws that posed a substantial obstacle to the fulfillment of purposes underlying the CSA in addition to those in direct conflict. The trial court, after concluding title 21 United States Code section 903 was intended to preserve all state laws except insofar as compliance with both the CSA and the state statute was impossible, found the MMP and CUA were not preempted because they did not mandate conduct violating the CSA.

*21 U.S.C. Section 903 Limits Preemption to Positive Conflicts*

The intent of Congress when it enacted the CSA is the touchstone of our preemption analysis. (*Jevne v. Superior Court, supra,* 35 Cal.4th at p. 949.) When Congress legislates in a "field which the States have traditionally occupied[,] . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (*Rice v. Santa Fe Elevator Corporation* (1947) 331 U.S. 218, 230.) Because the MMP and CUA address fields historically occupied by the states – medical practices (*Medtronic v. Lohr* (1996) 518 U.S. 470, 485) and state criminal sanctions for drug possession (*City of Garden Grove v. Superior Court, supra,* 157 Cal.App.4th at pp. 383-386 – the presumption against preemption informs our resolution of the scope to

which Congress intended the CSA to supplant state laws, and cautions us to narrowly interpret the scope of Congress's intended invalidation of state law. (*Medtronic, supra.*)

Our evaluation of the scope of Congress's intended preemption examines the text of the federal law as the best indicator of Congress's intent and, where that law "contains an express pre-emption clause, our 'task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.'" (*Sprietsma v. Mercury Marine* (2002) 537 U.S. 51, 62-63.) Because "[i]n these cases, our task is to identify the domain expressly pre-empted [citation] . . . 'an express definition of the pre-emptive reach of a statute . . . supports a reasonable inference . . . that Congress did not intend to pre-empt other matters [citation].'" (*Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 541; accord, *Viva!, supra,* 41 Cal.4th at pp. 944-945 [inference that express definition of preemptive reach means Congress did not intend to preempt other matters "is a simple corollary of ordinary statutory interpretation principles and in particular 'a variant of the familiar principle of *expressio unius est exclusio alterius*: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.'")

The language of title 21 United States Code section 903 expressly limits preemption to only those state laws in which there "is a *positive conflict*

between [the federal and state law] *so that the two cannot consistently stand together.*" (Italics added.) When construing a statute, the courts seek to attribute significance to every word and phrase (*United States v. Menasche* (1955) 348 U.S. 528, 538-539) in accordance with their usual and ordinary meaning. (*Strong v. State Bd. of Equalization* (2007) 155 Cal.App.4th 1182, 1193.) The phrase "positive conflict," particularly as refined by the phrase that "the two [laws] cannot consistently stand together," suggests that Congress did not intend to supplant all laws posing some conceivable obstacle to the purposes of the CSA, but instead intended to supplant only state laws that could not be adhered to without violating the CSA. Addressing analogous express preemption clauses, the court in *Southern Blasting Services v. Wilkes County, NC, supra,* 288 F.3d 584 held the state statute was not preempted because compliance with both the state and federal laws was not impossible, and the court in *Levine v. Wyeth* (Vt. 2006) 944 A.2d 179, 190-191 construed a federal statute with an analogous express preemption clause (which preserved state laws unless there is a direct and positive conflict) as "essentially remov[ing] from our consideration the question of whether [state law] claims [are preempted as] an obstacle to the purposes and objectives of Congress." Because title 21 United States Code section 903 preserves state laws except where there exists such a *positive* conflict that the two laws *cannot* consistently stand together, the *implied* conflict analysis of obstacle preemption

appears beyond the intended scope of title 21 United States Code section 903.

Counties argue this construction is too narrow, and we should construe Congress's use of the term "conflict" in section 903 as signifying an intent to incorporate both positive and implied conflict principles into the scope of state laws preempted by the CSA. Certainly, the United States Supreme Court has concluded that federal legislation containing an express preemption clause and a savings clause does not necessarily preclude application of implied preemption principles. (See *Geier v. American Honda Motor Co., supra,* 529 U.S. 861; *Buckman Co. v. Plaintiffs' Legal Comm.* (2001) 531 U.S. 341; *Sprietsma v. Mercury Marine, supra,* 537 U.S. 51.) However, none of Counties' cited cases examined preemption clauses containing the "positive conflict" language included in title 21 United States Code section 903, and thus provide little guidance here.[12]

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[12] In *Geier* and *Sprietsma,* the express preemption clauses precluded a state from establishing any safety standard regarding a vehicle (*Geier*) or vessel (*Sprietsma*) not identical to the federal standard, but separate "savings" clauses specified that compliance with the federal safety standards did not exempt any person from any liability under common law. (*Geier v. American Honda Motor Co., supra,* 529 U.S. at pp. 867-868; *Sprietsma v. Mercury Marine, supra,* 537 U.S. at pp. 58-59.) The analysis of the interplay between two statutes, as addressed by the *Geier* and *Sprietsma* courts, bears no resemblance to the issues presented here. In *Buckman Co. v. Plaintiffs' Legal Comm., supra,* 531 U.S. 341, the issues examined by the court are even more remote from the issues we must resolve. First, the

(Continued on following page)

Indeed, Counties' proffered construction effectively reads the term "positive" out of section 903, which transgresses the interpretative canon that we should accord meaning to every term and phrase employed by Congress. (*United States v. Menasche, supra,* 348 U.S. at 538-539.) Moreover, when Congress has intended to craft an express preemption clause signifying that *both* positive and obstacle conflict preemption will invalidate state laws, Congress has so structured the express preemption clause. (See 21 U.S.C. 350e(e)(1) [Congress declared that state requirements would be "preempted if – [¶] (A) complying with [the federal and state statutes] is not possible; or (B) the requirement of the State . . . as applied or enforced is an obstacle to accomplishing and carrying out [the federal statute]".) Where statutes involving similar issues contain language demonstrating the Legislature knows how to express its intent, "'the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intent existed with reference to the different statutes.'" (*In re Jennings* (2004) 34 Cal.4th 254, 273.)

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*Buckman* court specifically recognized that the preemption issue there involved "[p]olicing fraud against federal agencies[, which] is hardly 'a field which the States have traditionally occupied,' [citation] such as to warrant a presumption against finding federal pre-emption of a state-law cause of action." (*Buckman,* at p. 347.) Moreover, *Buckman* effectively relied on field preemption concerns to delimit state fraud claims. (*Id.* at pp. 348-353.) Neither of these aspects of *Buckman* is relevant to the issues we must resolve.

Because Congress provided that the CSA preempted only laws positively conflicting with the CSA so that the two sets of laws could not consistently stand together, and omitted any reference to an intent to preempt laws posing an obstacle to the CSA, we interpret title 21 United States Code section 903 as preempting only those state laws that positively conflict with the CSA so that simultaneous compliance with both sets of laws is impossible.

*The Identification Laws Do Not Positively Conflict With the CSA*

Counties do not identify any provision of the CSA necessarily violated when a county complies with its obligations under the state identification laws.[13] The identification laws obligate a county only to process applications for, maintain records of, and issue cards to, those individuals entitled to claim the exemption. The CSA is entirely silent on the ability of states to provide identification cards to their citizenry, and an

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[13] San Bernardino concedes on appeal that compliance with California law "may not require a violation of the CSA," although it then asserts it "encourages if not facilitates the CSA's violation." However, the *Garden Grove* court has already concluded, and we agree, that governmental entities do not incur aider and abettor liability by complying with their obligations under the MMP (*City of Garden Grove v. Superior Court, supra*, 157 Cal.App.4th at 389-392), and we therefore reject San Bernardino's implicit argument that requiring a county to issue identification cards renders that county an aider and abettor to create a positive conflict with the CSA.

entity that issues identification cards does not engage in conduct banned by the CSA.

Counties appear to argue there is a positive conflict between the identification laws and the CSA because the card issued by a county confirms that its bearer may violate or is immunized from federal laws.[14] However, the applications for the card expressly state the card will not insulate the bearer from federal laws, and the card itself does not imply the holder is immune from prosecution for federal offenses; instead, the card merely identifies those persons California has elected to exempt from California's sanctions. (Cf. *U.S. v. Cannabis Cultivators Club* (N.D. Cal. 1998) 5 F.Supp.2d 1086, 1100 [California's CUA "does not conflict with federal law because on its face it does not purport to make legal any conduct prohibited by federal law; it merely exempts certain conduct by certain persons from the California drug laws"].) Because the CSA law does not compel the states to impose criminal penalties for marijuana possession, the requirement that counties issue cards identifying those against whom California

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[14] San Diego also cites numerous subdivisions of the CUA and MMP, which contain a variety of provisions allegedly authorizing or permitting persons to engage in conduct expressly barred by the CSA, to show the CUA and MMP in positive conflict with the CSA. However, none of the cited subdivisions are contained in the statutes that Counties have standing to challenge (see fn. 8, *ante*), and we do not further consider Counties' challenges as to those provisions.

has opted not to impose criminal penalties does not positively conflict with the CSA.

Accordingly, we reject Counties' claim that positive conflict preemption invalidates the identification laws because Counties' compliance with those laws can "consistently stand together" with adherence to the provisions of the CSA.

D. The Identification Card Laws and Obstacle Preemption

Although we conclude title 21 United States Code section 903 signifies Congress's intent to maintain the power of states to elect "to 'serve as a laboratory' in the trial of 'novel social and economic experiments without risk to the rest of the country'" (*United States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483, 502 [conc. opn. of Stevens, J.]) by preserving all state laws that do not positively conflict with the CSA, we also conclude the identification laws are not preempted even if Congress had intended to preempt laws posing an obstacle to the CSA. Although state laws may be preempted under obstacle preemption when the law "'"stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"'" (*Viva!, supra,* 41 Cal.4th at p. 936), not every state law posing some de minimus impediment will be preempted. To the contrary, "[d]isplacement will occur only where, as we have variously described, a '*significant conflict*' exists between an identifiable 'federal

policy or interest and the [operation] of state law,' [citation] or the application of state law would 'frustrate specific objectives . . . ' [citation]." (*Boyle v. United Technologies Corp.* (1988) 487 U.S. 500, 507, italics added.) Indeed, *Boyle* implicitly recognized that when Congress has legislated in a field that the states have traditionally occupied, rather than in an area of unique federal concern, obstacle preemption requires an even sharper conflict with federal policy before the state statute will be invalidated. (*Ibid.*)

We conclude the identification card laws do not pose a significant impediment to specific federal objectives embodied in the CSA. The purpose of the CSA is to combat recreational drug use, not to regulate a state's medical practices. (*Gonzales v. Oregon, supra,* 546 U.S. at pp. 270-272 [holding Oregon's assisted suicide law fell outside the preemptive reach of the CSA].) The identification card laws merely provide a mechanism allowing qualified California citizens, if they so elect, to obtain a form of identification that informs state law enforcement officers and others that they are medically exempted from the state's criminal sanctions for marijuana possession and use. Although California's decision to enact statutory exemptions from state criminal prosecution for such persons arguably undermines the goals of or is inconsistent with the CSA – a question we do not decide here – any alleged "obstacle" to the federal goals is presented by those California statutes that *create the exemptions,* not by the statutes providing a system for rapidly identifying exempt individuals.

The identification card statutes impose no significant *added* obstacle to the purposes of the CSA not otherwise inherent in the provisions of the exemptions that Counties do not have standing to challenge, and we therefore conclude the limited provisions of the MMP that Counties *may* challenge are not preempted by principles of obstacle preemption.

We are unpersuaded by Counties' arguments that the identifications laws, standing alone, present significant obstacles to the purposes of the CSA.[15] For example, Counties assert that identification cards make it "easier for individuals to use, possess, and cultivate marijuana" in violation of federal laws, without articulating why the absence of such a card – which is entirely voluntary and not a prerequisite to the exemptions available for such underlying conduct – renders the underlying conduct significantly more difficult.

Counties also appear to assert the identification card laws present a significant obstacle to the CSA because the bearer of an identification card will not be arrested by California's law enforcement officers despite being in violation of the CSA. However, the

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[15] The bulk of Counties' arguments on obstacle preemption focus on statutory provisions other than the identification card statutes. Because Counties do not have standing to challenge those statutes, we decline Counties' implicit invitation to issue an advisory opinion on whether those statutes are preempted by the CSA, and instead examine only those aspects of the statutory scheme imposing obligations on Counties.

unstated predicate of this argument is that the federal government is entitled to conscript a state's law enforcement officers into enforcing federal enactments, over the objection of that state, and this entitlement will be obstructed to the extent the identification card precludes California's law enforcement officers from arresting medical marijuana users. The argument falters on its own predicate because Congress does not have the authority to compel the states to direct their law enforcement personnel to enforce federal laws. In *Printz v. United States* (1997) 521 U.S. 898, the federal Brady Act purported to compel local law enforcement officials to conduct background checks on prospective handgun purchasers. The United States Supreme Court held the 10th Amendment to the United States Constitution deprived Congress of the authority to enact that legislation, concluding that "in [*New York v. United States* (1992) 505 U.S. 144 we ruled] that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." (*Printz*, at p. 935.)[16] Accordingly, we conclude

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[16] San Diego argues the anti-commandeering doctrine discussed in *Printz* is inapplicable because the court in *Hodel v.*

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the fact that California has decided to exempt the bearer of an identification card from arrest by state law enforcement for state law violations does not invalidate the identification laws under obstacle preemption. (Cf. *Conant v. Walters, supra,* 309 F.3d at p. 646 [conc. opn. of Kozinski, J.] ["That patients may be more likely to violate federal law if the additional deterrent of state liability is removed may worry the federal government, but the proper response – according to *New York* and *Printz* – is to ratchet up the federal regulatory regime, *not* to commandeer that of the state."].)

We conclude that even if Congress intended to preempt state laws that present a significant obstacle

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*Virginia Surface Mining Recl. Assn.* (1981) 452 U.S. 264, 289-290 explicitly rejected the assertion the Tenth Amendment delimited Congress's ability under the Commerce Clause to displace state laws. However, *Printz* rejected an analogous claim when it held that, although the Commerce Clause authorized Congress to *enact* legislation concerning handgun registration, the Brady Act's *direction of the actions of state executive officials* was not constitutionally valid under Article I, § 8, as a law "necessary and proper" to the execution of Congress's Commerce Clause power to regulate handgun sales, because when "a 'La[w] . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier [citation] it is not a 'La[w] . . . *proper* for carrying into Execution the Commerce Clause.'" (*Printz, supra,* at pp. 923-924.) Thus, although the Commerce Clause permits Congress to *enact* the CSA, it does not permit Congress to *conscript state officers* into arresting persons for violating the CSA.

to the CSA, the MMP identification card laws are not preempted.

## V

## THE AMENDMENT ISSUE

The CUA was adopted by initiative when the voters adopted Proposition 215. (*People v. Urziceanu* (2005) 132 Cal.App.4th 747, 767.) Article II, section 10, subdivision (c) of the California Constitution provides the Legislature may "amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval." San Bernardino asserts on appeal that the identification laws, which are among the statutes adopted by the Legislature without voter approval when it enacted the MMP, are invalid because they amend the CUA.

This issue, although not pleaded in the complaints filed by either San Bernardino or San Diego, was initially raised by County of Merced's (Merced) complaint in intervention. State argues on appeal that because Merced has not appealed, and only Merced formally pleaded the Article II, section 10, subdivision (c), issue, we may not on appeal consider San Bernardino's arguments as to this issue. During oral arguments on the motions for judgment on the pleadings, San Bernardino adopted and joined in Merced's arguments, without objection by State that the arguments were beyond the scope of San

Bernardino's pleadings. Additionally, the trial court's judgment, after noting that one of the issues raised by Merced and joined in by San Bernardino was the Article II, section 10, subdivision (c), issue, specifically noted in its judgment that "[a]t oral argument, each party agreed that all plaintiffs win or lose together," and thereafter ruled on the Article II, section 10, subdivision (c), issue. Under these circumstances, we conclude that because (1) the parties litigated the matter below on the understanding that San Diego and San Bernardino were properly asserting the additional ground of invalidity raised by Merced, and (2) the trial court's judgment against San Bernardino included a rejection of all of the arguments raised by all co-plaintiffs, San Bernardino may litigate this issue on appeal. (*See, e.g. Jones v. Dutra Construction Co.* (1997) 57 Cal.App.4th 871, 876-877.)

Although legislative acts are entitled to a strong presumption of constitutionality, the Legislature cannot amend an initiative, including the CUA, unless the initiative grants the Legislature authority to do so. (*Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1251-1253.) Because the CUA did not grant the Legislature the authority to amend it without voter approval, and the identification laws were enacted without voter approval, those laws are invalid if they *amend* the CUA within the meaning of Article II, section 10, subdivision (c) of the California Constitution.

The proscription embodied in Article II, section 10, subdivision (c) of the California Constitution is

designed to "'protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent.'" (*Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1484.) "[L]egislative enactments related to the subject of an initiative statute may be allowed" when they involve a "related but distinct area" (*Mobilepark West Homeowners Assn. v. Escondido Mobilepark West* (1995) 35 Cal.App.4th 32, 43) or relate to a subject of the initiative that the initiative "does not specifically authorize *or* prohibit." (*People v. Cooper* (2002) 27 Cal.4th 38, 47.)

The identification laws do not improperly amend the provisions of the CUA.[17] The MMP's identification card system, by specifying participation in that system is voluntary and a person may "claim the protections of [the CUA]" without possessing a card

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[17] We recognize the Second District Court of Appeal has concluded that one statute enacted as part of the MMP – Section 11362.77, subdivision (a) (establishing a ceiling on the amount of marijuana a qualified patient or primary caregiver may possess) – was an improper amendment of the CUA. (*See People v. Kelly* (May 22, 2008, B195624) ___ Cal.App.4th ___, 2008 Cal.App. LEXIS 768.) Although it is unclear either that the *Kelly* court was required to reach the issue or that its resolution of the issue was correct, *Kelly* did not purport to hold the entire MMP invalid but instead severed the quantity limitations of Section 11362.77, subdivision (a) from the balance of the MMP and determined only that the severed aspect of the MMP was an unconstitutional amendment of the CUA. Because we here address different aspects of the MMP from that considered in *Kelly*, the conclusion in *Kelly* is inapposite to our task.

(§ 11362.71, subd. (f)), demonstrates the MMP's identification card system is a discrete set of laws designed to confer distinct protections under California law that the CUA does *not* provide without limiting the protections the CUA *does* provide. For example, unlike the CUA (which did not immunize medical marijuana users from arrest but instead provided a limited "immunity" defense to prosecution under state law for cultivation or possession of marijuana, *see People v. Mower* (2002) 28 Cal.4th 457, 468-469), the MMP's identification card system is designed to protect against unnecessary arrest. (*See* § 11362.78 [law enforcement officer must accept the identification card absent reasonable cause to believe card was obtained or is being used fraudulently].) Additionally, the MMP exempts the bearer of an identification card (as well as qualified patients as defined by the MMP) from liability for other controlled substance offenses not expressly made available to medical marijuana users under the CUA. (Compare § 11362.5, subd. (d) [sections 11357 and 11358 do not apply to patient or primary caregiver if substance possessed or cultivated for personal medical purposes] with § 11362.765, subd. (a) [specified persons not subject to criminal liability for sections 11359, 11360, 11366.5 or 11570 in addition to providing exemptions from sections 11357 and 11358, which parallel the CUA's exemption].)

Counties, relying on *Franchise Tax Board v. Cory* (1978) 80 Cal.App.3d 772,[18] asserts that any legislation that adds provisions to an initiative statute, for purposes of either correcting it or clarifying it, is amendatory within the proscriptions of Article II, section 10, subdivision (c).[19] However, in *Franchise Tax Board,* the court invalidated the legislative enactment because the initiative statute required

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[18] San Bernardino appears to rely on *Planned Parenthood Affiliates v. Swoap* (1985) 173 Cal.App.3d 1187 for the proposition that legislative action constitutes an amendment of a prior initiative statute in violation of Article II, section 10, subdivision (c), of the California Constitution if its purpose is to clarify or correct uncertainties in existing law. However, the *Planned Parenthood Affiliates* court evaluated whether the legislation under consideration violated the single subject rule of Article IV, section 9 of the California Constitution, and had no occasion to consider whether the statute was invalid under Article II, section 10, subdivision (c).

[19] San Bernardino also quotes, without citation to the record, certain statements of legislative intent allegedly declaring the intent of the MMP was to "clarify the scope" of the CUA and "address issues that were not included in the [CUA]." Even were we to consider this argument (*but see Regents of University of California v. Sheily* (2004) 122 Cal.App.4th 824, 826-827, fn. 1 [failure of party to cite record permits appellate court to disregard matter]), it ignores that other legislative history accompanying adoption of the MMP specified "[n]othing in [the MMP] shall amend or change Proposition 215, nor prevent patients from providing a defense under Proposition 215. . . . *The limits set forth in [the MMP] only serve to provide immunity from arrest for patients taking part in the voluntary ID card program, they do not change Section 11362.5(Proposition 215).*" Thus, the legislative history suggests the MMP was *not* intended to alter or affect the rights provided by the CUA.

audits of financial reports of candidates for public office, and the legislative enactment both added to the audit requirements of the initiative statute (by specifying the standards to be employed by the audit) and by "significantly restricting the manner in which audits are to be conducted." (*Franchise Tax Board v. Cory, supra,* 80 Cal.App.3d at p. 777.)

Here, although the legislation that enacted the MMP added statutes regarding California's treatment of those who use medical marijuana or who aid such users, it did not add statutes or standards *to the CUA*. Instead, the MMP's identification card is a part of a separate legislative scheme providing separate protections for persons engaged in the medical marijuana programs, and the MMP carefully declared that the protections provided by the CUA were preserved without the necessity of complying with the identification card provisions. (§ 11362.71, subd. (f).) The MMP, in effect, amended provisions of the Health and Safety Code regarding regulation of drugs adopted by the Legislature, not provisions of the CUA. Because the MMP's identification card program has no impact on the protections provided by the CUA, we reject Counties' claim that those provisions are invalidated by Article II, section 10, subdivision (c), of the California Constitution.

## DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

/s/ McDonald
McDONALD, Acting P. J.

WE CONCUR:

/s/ O'Rourke
O'ROURKE, J.

/s/ Irion
IRION, J.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

COUNTY OF SAN DIEGO,

Plaintiff,

v.

SAN DIEGO NORML, a California Corporation, SANDRA SHEWRY, Director of the California Department of Health Services in her official capacity; and DOES 1 through 50 inclusive,

Defendants

COUNTY OF SAN BERNARDINO, and GARY PENROD as Sheriff of the COUNTY OF SAN BERNARDINO,

Plaintiffs,

v.

STATE OF CALIFORNIA; SANDRA SHEWRY, in her official capacity as Director of California Department of Health Services; and DOES 1 through 50, inclusive,

Defendants

Case No.
GIC 860665

**ORDER RE MOTIONS FOR JUDGMENT ON THE PLEADINGS**

Judge: Hon.
William R. Nevitt, Jr.
Dept.: 64

(Filed Dec. 6, 2006)

COUNTY OF MERCED AND MARK PAZIN, as Sheriff of the COUNTY OF MERCED, and DOES 51 through 100 inclusive,

Intervenors

WENDY CHRISTAKES; PAMELA SAKUDA; NORBERT LITZINGER; WILLIAM BRITT; YVONNE WESTBROOK; STEPHEN O'BRIEN; WO/MEN'S ALLIANCE FOR MEDICAL MARIJUANA; and AMERICANS FOR SAFE ACCESS,

Third-Party Plaintiff Intervenors.

The Court has considered the papers filed in support of and in opposition to the motion for judgment on the pleadings filed in this matter by each party. The Court heard oral argument on November 16, 2006. The matter has been submitted, and the Court now issues its rulings deciding those motions. These rulings dispose of the entire matter.

The rulings herein do not decide whether marijuana has medical benefits, or for whom. Those issues are not before this Court in this matter. This matter presents the Court with issues of law only.

A. The Nature and Procedural History of this Matter.

Case GIC860665 is the declaratory relief action filed on February 1, 2006, by County of San Diego against San Diego NORML, the State of California, and Sandra Shewry in her official capacity as Director of the California Department of Health Services.

Case GIC861051 is the declaratory relief action filed on February 8, 2006, by County of Bernardino and Gary Penrod, as Sheriff of the County of San Bernardino, against the State of California and Sandra Shewry.

On March 30, 2006, the above two cases were consolidated, with GIC860665 as the lead case.

On June 2, 2006, the Court granted the motion of County of Merced and Mark Pazin, as Sheriff of the County of Merced, for leave to file their Complaint In Intervention alleging causes of action for declaratory relief and injunctive relief.

On August 4, 2006, the Court granted the motion by Wendy Christakes, Pamela Sakuda, Norbert Litzinger, William Britt, Yvonne Westbrook, Stephen O'Brien, the Wo/Men's Alliance for Medical Marijuana and Americans for Safe Access (collectively, "Patient Intervenors") for leave to file their proposed complaint in intervention (on condition they simultaneously file an amendment to their proposed complaint in intervention that explicitly states that subdivision (d) of Health and Safety Code section 11362.5 is not being placed in issue by their complaint). That

complaint in intervention and the amendment thereto were filed on August 10, 2006.

The three counties and two sheriffs allege that Health and Safety Code[1] section 11362.5 ("Compassionate Use Act" or "CUA"), with the exception of subdivision (d) thereof, and sections 11362.7 through 11362.83 ("MMP"[2]) are preempted, by the Supremacy Clause of the United States Constitution, by the federal Controlled Substance Act ("CSA") and/or by the Single Convention on Narcotic Drugs ("Single Convention"). The CUA is the codification of Proposition 215, an initiative.

County of Merced and Sheriff Pazin also allege that the MMP (in purported contravention of section 10(c) of article II of the California Constitution) improperly "amends" the CUA. At oral argument on November 16, 2006, the other counties and sheriff joined in this challenge under section 10(c) of article II of the California Constitution.

The counties and sheriffs filed motions for judgment on the pleadings. The State of California (and Sandra Shewry) and Patient Intervenors also filed

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[1] Unless otherwise noted, statutory references herein are to the California Health and Safety Code.

[2] The Medical Marijuana Program (Div. 10, Ch. 6, Art. 2.5) actually includes sections 11362.7 through 11362.9, but the plaintiffs' complaints challenge only 11362.7 through 11362.83, i.e., all but § 11362.9. The challenged sections will be referred to herein as the "MMP."

motions for judgment on the pleadings. San Diego NORML also filed a notice of motion for judgment on the pleadings, but merely "adopts, joins in, and incorporates by reference herein all arguments made by" the State and Patient Intervenors. San Diego NORML also "adopts, joins in, and incorporates by reference as though set forth fully herein all arguments" made in the State's and Patient Intervenors' oppositions to the counties' motions.

The three counties and two sheriffs are collectively referred to below as "plaintiffs." The State, Sandra Shewry, Patient Intervenors and San Diego NORML are collectively referred to below as "defendants."

At oral argument, each party agreed that all plaintiffs win or lose together and that all defendants win or lose together.

B. The Primary Legal Issues.

The three primary legal issues presented by this matter are as follows:

1. Whether plaintiffs have standing to file and pursue their complaints.

2. Whether the CUA, with the exception of subdivision (d) thereof, and the MMP are preempted by the Supremacy Clause of the United States Constitution, by the federal CSA, and/or by the Single Convention.

3. Whether the MMP, in alleged contravention of section 10(c) of article II of the California Constitution, improperly "amends" the CUA, an initiative statute.

Each of these three issues is addressed below.

1. Whether plaintiffs have standing to file and pursue their complaints.

The issue of plaintiffs' standing was first raised via demurrers, which the Court overruled. The Court finds the standing arguments now made by defendants to be unpersuasive.

All plaintiffs have standing to file and pursue their complaints.

2. Whether the CUA, with the exception of subdivision (d) thereof, and the MMP are preempted by the Supremacy Clause, by the CSA, and/or by the Single Convention.

As the United States Supreme Court has stated:

> The *Supremacy Clause* [of the United States Constitution] unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is "superior to that of the States to provide for the welfare or necessities of their inhabitants," however legitimate or dire those necessities may be.
>
> *Gonzales v. Raich* (2005) 545 U.S. 1, 29 (citations omitted).

As the California Supreme Court has stated:

> The party who claims that a state statute is preempted by federal law bears the burden of demonstrating preemption. An important corollary of this rule, often noted and applied by the United States Supreme Court, is that "*[w]hen Congress legislates in a field traditionally occupied by the States, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'*" . . . [T]his venerable presumption "provides assurance that 'the federal-state balance,' . . . will not be disturbed unintentionally by Congress or unnecessarily by the courts."
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> *Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 956-57 (citations omitted; emphasis in original).

21 U.S.C. § 903, which all parties acknowledge applies here, provides:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, *unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.*
>
> (Emphasis added.)

The State convincingly rebuts County of San Diego's argument that the CUA and MMP are preempted because they "authorize" conduct that federal law prohibits. The State is correct that the test is whether the CUA or MMP *requires* conduct that violates federal law.

Plaintiffs do not effectively rebut defendants' contention that if all the CUA and MMP do is remove penalties for the medicinal use of marijuana from *California's* drug laws, then there is no "positive conflict" between federal and "State law so that the two cannot consistently stand together."

Defendants persuasively argue that requiring the counties to issue identification cards for the purpose of identifying those whom California chooses not to arrest and prosecute for certain activities involving marijuana does not create a "positive conflict" for purposes of 21 U.S.C. § 903.

However, section 11362.78 effectively *requires* state and local law enforcement officials to "accept" the identification cards. It appears that "accepting" the card is for purposes of the prohibition set forth in section 11362.71(e). Section 11362.71(e) provides:

> *No person* or designated primary caregiver in possession of a valid identification card *shall be subject to arrest* for possession, transportation, delivery, or cultivation of medical marijuana in an amount established pursuant to this article, unless there is reasonable cause to believe that the information

> contained in the card is false or falsified, the card has been obtained by means of fraud, or the person is otherwise in violation of the provisions of this article.
>
> (Emphasis added.)[3]

To the extent the MMP purports to prohibit arrest for violation of the CSA's regulation of "possession, transportation, delivery, or cultivation of medical marijuana," the MMP does not, as defendants argue, merely "remov[e] marijuana use by the seriously ill from the scope of state penalties;" and to that extent, there is a "positive conflict" with the CSA. However, this Court, guided by *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 509, construes sections 11362.71(e) and 11362.78 as prohibiting arrest under California, not federal, laws for "possession, transportation, delivery, or cultivation of medical marijuana."

Plaintiffs argue that the common law doctrine of "obstacle conflict" preemption applies, notwithstanding the existence of 21 U.S.C. § 903. The Court disagrees with that argument. However, even if the

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[3] The broad language of section 11362.71(e) contrasts with the more specific language of (unchallenged) section 11362.5(d), which refers specifically to two California statutes, i.e., "Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana." Section 11362.71(e) also contrasts with sections 11362.765 and 11362.775, which refer specifically to California statutes, i.e., "Section 11357, 11358, 11359, 11360, 11366.5, or 11570."

common law doctrine of "obstacle conflict" preemption did apply, there is, as explained by the State in its opposition, no such obstacle created by the CUA or the MMP.

As for the arguments made by plaintiffs regarding the Single Convention, the Court found defendants' arguments more persuasive.

Neither the CUA nor the MMP is preempted by the Supremacy Clause, by the CSA, or by the Single Convention.

3. Whether the MMP, in alleged contravention of section 10(c) of article II of the California Constitution, improperly "amends" the CUA, an initiative statute.

Section 10(c) of article II of the California Constitution provides:

> The Legislature may amend or repeal referendum statutes. It may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.

Plaintiffs challenge the MMP under this section of the California Constitution. The issue is whether the MMP "amends" the CUA.

Guided by precedent, including that summarized in *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1484-1486, the Court concludes the MMP does not amend the CUA.

The MMP creates a stand-alone and (from the perspective of the persons protected by the CUA) voluntary system. Most importantly, the MMP does not add to or take away from the CUA.

Further, although the Court's ruling does not turn on this point, when the voters passed Proposition 215 (which is codified in the CUA), they expressly stated that one of their purposes was "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes. . . . " The MMP does not interfere with that purpose. The MMP also appears to be consistent with the voters' other two expressly stated purposes, i.e., "[t]o ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction," and "[t]o encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana." (Section 11362.5(b)(1).)

In short, the Court upholds the Compassionate Use Act (which is the codification of Proposition 215, the initiative passed by the voters) and the MMP (statutes passed by the Legislature) against the challenges brought by plaintiffs herein.

C. Injunctive Relief.

Injunctive relief was requested by some of the parties, *i.e.*, by Patient Intervenors and by County of Merced and Sheriff Pazin.

On December 1, 2006, County of San Diego filed a memorandum of points and authorities regarding injunctive relief.

On November 30, 2006, County of Merced and Sheriff Pazin filed a joinder in the brief filed by County of San Diego regarding requests for injunctive relief. In that joinder, County of Merced and Sheriff Pazin stated they do "not intend to further pursue [their] cause of action for injunctive relief."

On December 1, 2006, County of San Bernardino and Sheriff Penrod filed a joinder in the brief filed by County of San Diego on December 1.

On December 1, 2006, Patient Intervenors filed their Supplemental Brief Regarding Injunctive Relief.

Having reviewed the aforementioned briefs filed on November 30 and December 1, 2006, the Court does not grant any injunctive relief. The Court grants no injunctive relief to County of Merced and Sheriff Pazin because they no longer seek it and, moreover, they do not prevail here. The Court grants no relief to Patient Intervenors because, as they concede, "the issuance of an injunction would be premature at this time."

The Court neither opines now as to the propriety of any injunctive relief that may be sought in the future nor retains any extraordinary jurisdiction in this matter. If, in the future, any party concludes it would be jurisdictionally, procedurally and substantively proper for this Court to grant injunctive relief,

they may apply for such relief; and the Court will consider the propriety of the application.

D. Requests For Judicial Notice.

The parties' requests for judicial notice are all unopposed and granted.

E. The Court's Rulings.

Plaintiffs' motions for judgment on the pleadings are denied. Defendants' motions for judgment on the pleadings are granted.

No injunctive relief is granted by this order.

The Attorney General's office is to prepare and submit a proposed judgment within thirty days, after giving all other counsel an opportunity to review it.

The Attorney General's office is to give notice of ruling in accordance with Code of Civil Procedure section 1019.5(a).

Dated: December 6, 2006

/s/ William R. Nevitt, Jr.
WILLIAM R. NEVITT, JR.
Judge of the Superior Court

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**Attorneys for State of California, and Sandra Shewry, Director of the California Department of Health Services**

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO

| | |
|---|---|
| COUNTY OF SAN DIEGO,<br>Plaintiffs,<br>vs.<br>SAN DIEGO NORML, a California Corporation; STATE OF CALIFORNIA; SANDRA SHEWRY, Director of the California Department of Health Services in her official capacity; and DOES 1 through 50, inclusive,<br>Defendants. | Consolidated Case No. GIC 860665<br>**NOTICE OF ENTRY OF JUDGMENT**<br>DATE: November 16, 2006<br>TIME: 1:30 p.m.<br>DEPT: 64<br>JUDGE: The Honorable William R. Nevitt, Jr. |

COUNTY OF SAN BERNARDINO, and GARY PENROD as Sheriff of the COUNTY OF SAN BERNARDINO,

Plaintiffs,

vs.

STATE OF CALIFORNIA; SANDRA SHEWRY, in her official capacity as Director of California Department of Health Services; and DOES 1 through 50, inclusive,

Defendants.

---

COUNTY OF MERCED and MARK PAZIN, as Sheriff of the County of Merced, and DOES 51 THROUGH 100, inclusive,

Intervenors.

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WENDY CHRISTAKES; PAMELA SAKUDA; NORBERT LITZINGER; WILLIAM BRITT; YVONNE WESTBROOK; STEPHEN O'BRIEN; WO/MEN'S ALLIANCE FOR MEDICAL MARIJUANA; AND AMERICANS FOR SAFE ACCESS,

Third-Party Plaintiff Intervenors.

**NOTICE IS HEREBY GIVEN** that judgment was duly entered in this matter on January 17, 2007. A true and correct copy of the judgment is attached hereto as Exhibit "A."

Dated: January 30, 2007

Respectfully submitted,

BILL LOCKYER
Attorney General of the
State of California

STACY BOULWARE EURIE
Senior Assistant Attorney
General

/s/ Jonathan K. Renner
JONATHAN K. RENNER
Supervising Deputy
Attorney General

**Attorneys for State of California, and Sandra Shewry, Director of the California Department of Health Services**

***County of San Diego v. San Diego NORML, et al.***
***San Diego County Superior Court Consolidated Case No. GIC860665***

**NOTICE OF ENTRY OF JUDGMENT**

**EXHIBIT "A"**

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

COUNTY OF SAN DIEGO,

Plaintiffs,

vs.

SAN DIEGO NORML, a California Corporation; STATE OF CALIFORNIA; SANDRA SHEWRY, Director of the California Department of Health Services in her official capacity; and DOES 1 through 50, inclusive,

Defendants.

---

COUNTY OF SAN BERNARDINO, and GARY PENROD as Sheriff of the COUNTY OF SAN BERNARDINO,

Plaintiffs,

vs.

STATE OF CALIFORNIA, SANDRA SHEWRY, in her official capacity as Director

Consolidated Case No. GIC 860665

~~[PROPOSED]~~ **JUDGMENT ON CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS**

(Filed Jan. 17, 2007)

DATE: November 16, 2006
TIME: 1:30 p.m.
DEPT: 64
JUDGE: The Honorable William R. Nevitt, Jr.

| |
|---|
| of California Department of Health Services; and DOES 1 through 50, inclusive,<br>Defendants. |
| COUNTY OF MERCED and MARK PAZIN, as Sheriff of the County of Merced, and DOES 51 THROUGH 100, inclusive,<br>Intervenors. |
| WENDY CHRISTAKES; PAMELA SAKUDA; NORBERT LITZINGER; WILLIAM BRITT; YVONNE WESTBROOK; STEPHEN O'BRIEN; WO/MEN'S ALLIANCE FOR MEDICAL MARIJUANA; AND AMERICANS FOR SAFE ACCESS,<br>Third-Party Plaintiff Intervenors. |

Plaintiffs' and Defendants' Cross-Motions for Judgment on the Pleadings came regularly for hearing on November 16, 2006, the Honorable William R. Nevitt, Jr. presiding. Plaintiff County of San Diego appeared through its counsel of record Thomas D. Bunton. Plaintiff County of San Bernardino, and Gary Penrod as Sheriff of the County of San Bernardino, appeared through their counsel of record Alan L. Green and Charles J. Larkin. Defendant San Diego

NORML appeared through its counsel of record Jeremy D. Blank. Intervenors County of Merced and Mark Pazin, as Sheriff of the County of Merced, appeared through their counsel of record Walter W. Wall. Third-Party Plaintiff Intervenors Wendy Christakes, Pamela Sakuda, Norbert Litzinger, William Britt, Yvonne Westbrook, Stephen O'Brien, Wo/Men's Alliance for Medical Marijuana and Americans for Safe Access appeared through their counsel of record Adam B. Wolf and Joe Elford. Defendants State of California and Sandra Shewry, in her official capacity as Director of California Department of Health Services, appeared through their counsel Leslie R. Lopez.

The Court, having read and considered all papers filed in consideration with the cross-motions for judgment on the pleadings, including all other relevant matters, and having heard and considered the arguments of counsel, took the matter under submission. Thereafter, on December 6, 2006, the Court issued its decision entitled *Order Re Motions For Judgment On The Pleadings*, which is attached hereto as Exhibit "A," and incorporated in its entirety by this reference.

**WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:**

1. Judgment is entered in favor [cf] Defendants State of California and Sandra Shewry, in her official capacity as Director of California Department of Health Services, San Diego NORML, a California corporation, and Third-Party Plaintiff Intervenors Wendy Christakes, Pamela Sakuda, Norbert Litzinger,

William Britt, Yvonne Westbrook, Stephen O'Brien, Wo/Men's Alliance for Medical Marijuana and Americans for Safe Access.

2. Judgment is entered against Plaintiffs County of San Diego, County of San Bernardino and Gary Penrod, as Sheriff of the County of San Bernardino, and Intervenors County of Merced and Mark Pazin, as Sheriff of the County of Merced.

3. Defendants State of California and Sandra Shewry, in her official capacity as Director of California Department of Health Services, shall recover their costs pursuant to memoranda of costs, including any costs recoverable pursuant to Government Code section 6103.5 in the amount of $_____.

4. Third-Party Plaintiff Intervenors Wendy Christakes, Pamela Sakuda, Norbert Litzinger, William Britt, Yvonne Westbrook, Stephen O'Brien, Wo/Men's Alliance for Medical Marijuana and Americans for Safe Access shall recover their costs pursuant to memoranda of costs in the amount of $_____.

5. Defendant San Diego NORML, a California corporation, shall recover its costs pursuant to memoranda of costs in the amount of $_____.

Dated: JAN 17 2007

/s/ WILLIAM R. NEVITT, JR.
The Honorable
William R. Nevitt, Jr.
Judge of the San Diego
County Superior Court

Court of Appeal, Fourth Appellate District,
Div. 1 – No. D050333
**S166505**

**IN THE SUPREME COURT OF CALIFORNIA**

**En Banc**

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COUNTY OF SAN DIEGO et al.,
Plaintiffs and Appellants,

v.

SAN DIEGO NORML et al.,
Defendants and Respondents;

WENDY CHRISTAKES et al.,
Interveners and Respondents.

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(Filed Oct. 16 2008)

The petitions for review are denied.

GEORGE
Chief Justice

JOHN J. SANSONE, County Counsel
County of San Diego
By C. ELLEN PILSECKER, Senior Deputy
(State Bar No. 154241)
THOMAS D. BUNTON, Senior Deputy
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1600 Pacific Highway, Room 355
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Telephone: (619) 531-4713

Attorneys for Plaintiff County of San Diego

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF SAN DIEGO**

| | |
|---|---|
| COUNTY OF SAN DIEGO,<br>Plaintiff,<br>v.<br>SAN DIEGO NORML, a California corporation; STATE OF CALIFORNIA; SANDRA SHEWRY, Director of the California Department of Health Services in her official capacity; and DOES 1 through 50, inclusive,<br>Defendants. | Consolidated Case No. GIC 860665<br>Action Filed: February 1, 2006<br>**COUNTY OF SAN DIEGO'S NOTICE OF RULING**<br>(Filed Jun. 14, 2006)<br>Dept: 64<br>ICJ: Honorable William R. Nevitt, Jr. |
| COUNTY OF SAN BERNARDINO, et al.,<br>Plaintiffs,<br>v. | |

STATE OF CALIFORNIA, et al.,

Defendants,

COUNTY OF MERCED and MARK PAZIN, as Sheriff of the County of Merced,

Intervenors.

TO ALL PARTIES AND/OR THEIR ATTORNEYS OF RECORD HEREIN:

Please take notice that on June 9, 2006, the Court made the following order in reference to Defendants' Demurrers to the Complaints:

The demurrer by State of California and Sandra Shewry (collectively, "State") to the complaint filed by County of San Bernardino and San Bernardino County Sheriff Gary Penrod ("the San Bernardino complaint") is overruled. The demurrer by State to the complaint filed by County of San Diego ("the San Diego complaint") is overruled. The demurrer by San Diego NORML, Inc. ("NORML") to the San Diego complaint is overruled.

The San Diego complaint and the San Bernardino complaint each allege a single cause of action for declaratory relief.

"[T]he rule is now established that the defendant cannot, on demurrer, attack the merits of the plaintiff's [declaratory relief] claim. The complaint is

sufficient if it shows an actual controversy; it need not show that plaintiff is in the right.' (5 Witkin, Cal. Procedure, (4th ed. 1997) Pleading § 831, pp. 288-289.)" (Lockheed Corp. v. Continental Ins. Co. (2005) 134 Cal.App.4th 187, 221.) "The court may sustain a demurrer [to a declaratory relief cause of action] on the ground that the complaint fails to allege an actual or present controversy, or that it is not 'justiciable.'" (DeLaura v. Beckett (2006) 137 Cal.App.4th 542, 545.)

"Whether an action is justiciable for purposes of Code of Civil Procedure section 1060 is . . . a matter entrusted to the sound discretion of the trial court." (Application Group, Inc. v. Hunter Group, Inc. (1998) 61 Cal.App.4th 881, 893.)

"The concept of justiciability involves the intertwined criteria of ripeness and standing." (California Water & Tel. Co. v. Los Angeles County (1967) 253 Cal.App.2d 16, 22-23.) "A two-pronged test is used to determine the ripeness of a controversy: (1) whether the dispute is sufficiently concrete so that declaratory relief is appropriate; and (2) whether the parties will suffer hardship if judicial consideration is withheld. Under the first prong, the courts will decline to adjudicate a dispute if the abstract posture of [the] proceeding makes it difficult to evaluate . . . the issues, if the court is asked to speculate on the resolution of hypothetical situations, or if the case presents a contrived inquiry. Under the second prong, the courts will not intervene merely to settle a difference of opinion; there must be an imminent and significant hardship inherent in further delay." (City of Santa

Monica v. Stewart (2005) 126 Cal.App.4th 43, 64, internal quotation marks and citations omitted.)

In its Demurrers, State contends that San Diego County, San Bernardino County and Sheriff Penrod "cannot present an actual ripe controversy regarding the constitutionality of California's medical marijuana laws." The Court finds that these three plaintiffs have each adequately alleged both ripeness and standing as to defendants State of California and Sandra Shewry.

Neither County is precluded, because it is a political subdivision of the State, from invoking the supremacy clause of the United States Constitution to challenge a state law. (Star-Kist Foods, Inc. v. County of Los Angeles (1986) 42 Cal.3d 1, 6-8.)

NORML's demurrer to the San Diego complaint attacks the merits of San Diego County's claim. The Court need not, and does not, address those merits at this time. NORML's demurrer also contends that it is not a "proper defendant" apparently because there is no "actual controversy" between itself and San Diego County. In the letter attached to the San Diego complaint as Exhibit A, NORML's counsel states that NORML may be "force[d] . . . to bring a class action lawsuit to compel compliance [with Health & Safety Code sections 11362.71-11362.79]." This is sufficient to create an actual controversy between NORML and San Diego County as to whether these statutes are "preempted under the Supremacy Clause of the

United States Constitution" (San Diego complaint, ¶ 26).

State's unopposed requests for judicial notice are granted. San Bernardino County and Sheriff Penrod's unopposed request for judicial notice is granted. The Court takes judicial notice as requested of the documents but not necessarily of the truth of the matters stated therein.

NORML's request for judicial notice, submitted with its reply, is denied. The "press releases and news articles" of which NORML requests judicial notice are not proper matter for judicial notice. In addition, they appear relevant only to the merits of San Diego County's action, and therefore are not relevant to this demurrer.

Counsel for State and for NORML are reminded to comply with California Rules of Court, rule 311(e) (re tabbing exhibits).

The minutes constitute the order of the Court and no formal order is required.

Counsel for plaintiff San Diego County are directed to serve notice of ruling in accordance with the provisions of Code of Civil Procedure section 1019.5(a).

DATED: June 13, 2006

JOHN J. SANSONE,
County Counsel

By /s/ Thomas D. Bunton
THOMAS D. BUNTON,
Senior Deputy Attorneys for
Plaintiff County of San Diego

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**HEALTH AND SAFETY CODE**
**SECTION 11362.5**

11362.5. (a) This section shall be known and may be cited as the Compassionate Use Act of 1996.

(b)(1) The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows:

(A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.

(B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.

(C) To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.

(2) Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes.

(c) Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes.

(d) Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

(e) For the purposes of this section, "primary caregiver" means the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person.

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**HEALTH AND SAFETY CODE**
**SECTION 11362.7-11362.83**

11362.7. For purposes of this article, the following definitions shall apply:

(a) "Attending physician" means an individual who possesses a license in good standing to practice medicine or osteopathy issued by the Medical Board of California or the Osteopathic Medical Board of California and who has taken responsibility for an aspect of the medical care, treatment, diagnosis, counseling, or referral of a patient and who has conducted a medical examination of that patient before recording

in the patient's medical record the physician's assessment of whether the patient has a serious medical condition and whether the medical use of marijuana is appropriate.

(b) "Department" means the State Department of Health Services.

(c) "Person with an identification card" means an individual who is a qualified patient who has applied for and received a valid identification card pursuant to this article.

(d) "Primary caregiver" means the individual, designated by a qualified patient or by a person with an identification card, who has consistently assumed responsibility for the housing, health, or safety of that patient or person, and may include any of the following:

(1) In any case in which a qualified patient or person with an identification card receives medical care or supportive services, or both, from a clinic licensed pursuant to Chapter 1 (commencing with Section 1200) of Division 2, a health care facility licensed pursuant to Chapter 2 (commencing with Section 1250) of Division 2, a residential care facility for persons with chronic life-threatening illness licensed pursuant to Chapter 3.01 (commencing with Section 1568.01) of Division 2, a residential care facility for the elderly licensed pursuant to Chapter 3.2 (commencing with Section 1569) of Division 2, a hospice, or a home health agency licensed pursuant to Chapter 8 (commencing with Section 1725) of

Division 2, the owner or operator, or no more than three employees who are designated by the owner or operator, of the clinic, facility, hospice, or home health agency, if designated as a primary caregiver by that qualified patient or person with an identification card.

(2) An individual who has been designated as a primary caregiver by more than one qualified patient or person with an identification card, if every qualified patient or person with an identification card who has designated that individual as a primary caregiver resides in the same city or county as the primary caregiver.

(3) An individual who has been designated as a primary caregiver by a qualified patient or person with an identification card who resides in a city or county other than that of the primary caregiver, if the individual has not been designated as a primary caregiver by any other qualified patient or person with an identification card.

(e) A primary caregiver shall be at least 18 years of age, unless the primary caregiver is the parent of a minor child who is a qualified patient or a person with an identification card or the primary caregiver is a person otherwise entitled to make medical decisions under state law pursuant to Sections 6922, 7002, 7050, or 7120 of the Family Code.

(f) "Qualified patient" means a person who is entitled to the protections of Section 11362.5, but who

does not have an identification card issued pursuant to this article.

(g) "Identification card" means a document issued by the State Department of Health Services that document identifies a person authorized to engage in the medical use of marijuana and the person's designated primary caregiver, if any.

(h) "Serious medical condition" means all of the following medical conditions:

(1) Acquired immune deficiency syndrome (AIDS).

(2) Anorexia.

(3) Arthritis.

(4) Cachexia.

(5) Cancer.

(6) Chronic pain.

(7) Glaucoma.

(8) Migraine.

(9) Persistent muscle spasms, including, but not limited to, spasms associated with multiple sclerosis.

(10) Seizures, including, but not limited to, seizures associated with epilepsy.

(11) Severe nausea.

(12) Any other chronic or persistent medical symptom that either:

(A) Substantially limits the ability of the person to conduct one or more major life activities as defined in the Americans with Disabilities Act of 1990 (Public Law 101-336).

(B) If not alleviated, may cause serious harm to the patient's safety or physical or mental health.

(i) "Written documentation" means accurate reproductions of those portions of a patient's medical records that have been created by the attending physician, that contain the information required by paragraph (2) of subdivision (a) of Section 11362.715, and that the patient may submit to a county health department or the county's designee as part of an application for an identification card.

11362.71. (a)(1) The department shall establish and maintain a voluntary program for the issuance of identification cards to qualified patients who satisfy the requirements of this article and voluntarily apply to the identification card program.

(2) The department shall establish and maintain a 24-hour, toll-free telephone number that will enable state and local law enforcement officers to have immediate access to information necessary to verify the validity of an identification card issued by the department, until a cost-effective Internet Web-based system can be developed for this purpose.

(b) Every county health department, or the county's designee, shall do all of the following:

(1) Provide applications upon request to individuals seeking to join the identification card program.

(2) Receive and process completed applications in accordance with Section 11362.72.

(3) Maintain records of identification card programs.

(4) Utilize protocols developed by the department pursuant to paragraph (1) of subdivision (d).

(5) Issue identification cards developed by the department to approved applicants and designated primary caregivers.

(c) The county board of supervisors may designate another health-related governmental or nongovernmental entity or organization to perform the functions described in subdivision (b), except for an entity or organization that cultivates or distributes marijuana.

(d) The department shall develop all of the following:

(1) Protocols that shall be used by a county health department or the county's designee to implement the responsibilities described in subdivision (b), including, but not limited to, protocols to confirm the accuracy of information contained in an application and to protect the confidentiality of program records.

(2) Application forms that shall be issued to requesting applicants.

(3) An identification card that identifies a person authorized to engage in the medical use of marijuana and an identification card that identifies the person's designated primary caregiver, if any.

The two identification cards developed pursuant to this paragraph shall be easily distinguishable from each other.

(e) No person or designated primary caregiver in possession of a valid identification card shall be subject to arrest for possession, transportation, delivery, or cultivation of medical marijuana in an amount established pursuant to this article, unless there is reasonable cause to believe that the information contained in the card is false or falsified, the card has been obtained by means of fraud, or the person is otherwise in violation of the provisions of this article.

(f) It shall not be necessary for a person to obtain an identification card in order to claim the protections of Section 11362.5.

11362.715. (a) A person who seeks an identification card shall pay the fee, as provided in Section 11362.755, and provide all of the following to the county health department or the county's designee on a form developed and provided by the department:

(1) The name of the person, and proof of his or her residency within the county.

(2) Written documentation by the attending physician in the person's medical records stating that the person has been diagnosed with a serious medical condition and that the medical use of marijuana is appropriate.

(3) The name, office address, office telephone number, and California medical license number of the person's attending physician.

(4) The name and the duties of the primary caregiver.

(5) A government-issued photo identification card of the person and of the designated primary caregiver, if any. If the applicant is a person under 18 years of age, a certified copy of a birth certificate shall be deemed sufficient proof of identity.

(b) If the person applying for an identification card lacks the capacity to make medical decisions, the application may be made by the person's legal representative, including, but not limited to, any of the following:

(1) A conservator with authority to make medical decisions.

(2) An attorney-in-fact under a durable power of attorney for health care or surrogate decisionmaker authorized under another advanced health care directive.

(3) Any other individual authorized by statutory or decisional law to make medical decisions for the person.

(c) The legal representative described in subdivision (b) may also designate in the application an individual, including himself or herself, to serve as a primary caregiver for the person, provided that the individual meets the definition of a primary caregiver.

(d) The person or legal representative submitting the written information and documentation described in subdivision (a) shall retain a copy thereof.

11362.72. (a) Within 30 days of receipt of an application for an identification card, a county health department or the county's designee shall do all of the following:

(1) For purposes of processing the application, verify that the information contained in the application is accurate. If the person is less than 18 years of age, the county health department or its designee shall also contact the parent with legal authority to make medical decisions, legal guardian, or other person or entity with legal authority to make medical decisions, to verify the information.

(2) Verify with the Medical Board of California or the Osteopathic Medical Board of California that the attending physician has a license in good standing to practice medicine or osteopathy in the state.

(3) Contact the attending physician by facsimile, telephone, or mail to confirm that the medical records submitted by the patient are a true and correct copy of those contained in the physician's office records. When contacted by a county health department or the county's designee, the attending physician shall confirm or deny that the contents of the medical records are accurate.

(4) Take a photograph or otherwise obtain an electronically transmissible image of the applicant and of the designated primary caregiver, if any.

(5) Approve or deny the application. If an applicant who meets the requirements of Section 11362.715 can establish that an identification card is needed on an emergency basis, the county or its designee shall issue a temporary identification card that shall be valid for 30 days from the date of issuance. The county, or its designee, may extend the temporary identification card for no more than 30 days at a time, so long as the applicant continues to meet the requirements of this paragraph.

(b) If the county health department or the county's designee approves the application, it shall, within 24 hours, or by the end of the next working day of approving the application, electronically transmit the following information to the department:

(1) A unique user identification number of the applicant.

(2) The date of expiration of the identification card.

(3) The name and telephone number of the county health department or the county's designee that has approved the application.

(c) The county health department or the county's designee shall issue an identification card to the applicant and to his or her designated primary caregiver, if any, within five working days of approving the application.

(d) In any case involving an incomplete application, the applicant shall assume responsibility for rectifying the deficiency. The county shall have 14 days from the receipt of information from the applicant pursuant to this subdivision to approve or deny the application.

11362.735. (a) An identification card issued by the county health department shall be serially numbered and shall contain all of the following:

(1) A unique user identification number of the cardholder.

(2) The date of expiration of the identification card.

(3) The name and telephone number of the county health department or the county's designee that has approved the application.

(4) A 24-hour, toll-free telephone number, to be maintained by the department, that will enable state and local law enforcement officers to have immediate access to information necessary to verify the validity of the card.

(5) Photo identification of the cardholder.

(b) A separate identification card shall be issued to the person's designated primary caregiver, if any, and shall include a photo identification of the caregiver.

11362.74. (a) The county health department or the county's designee may deny an application only for any of the following reasons:

(1) The applicant did not provide the information required by Section 11362.715, and upon notice of the deficiency pursuant to subdivision (d) of Section 11362.72, did not provide the information within 30 days.

(2) The county health department or the county's designee determines that the information provided was false.

(3) The applicant does not meet the criteria set forth in this article.

(b) Any person whose application has been denied pursuant to subdivision (a) may not reapply for six months from the date of denial unless otherwise authorized by the county health department or the county's designee or by a court of competent jurisdiction.

(c) Any person whose application has been denied pursuant to subdivision (a) may appeal that decision to the department. The county health department or the county's designee shall make available a telephone

number or address to which the denied applicant can direct an appeal.

11362.745. (a) An identification card shall be valid for a period of one year.

(b) Upon annual renewal of an identification card, the county health department or its designee shall verify all new information and may verify any other information that has not changed.

(c) The county health department or the county's designee shall transmit its determination of approval or denial of a renewal to the department.

11362.755. (a) The department shall establish application and renewal fees for persons seeking to obtain or renew identification cards that are sufficient to cover the expenses incurred by the department, including the startup cost, the cost of reduced fees for Medi-Cal beneficiaries in accordance with subdivision (b), the cost of identifying and developing a cost-effective Internet Web-based system, and the cost of maintaining the 24-hour toll-free telephone number. Each county health department or the county's designee may charge an additional fee for all costs incurred by the county or the county's designee for administering the program pursuant to this article.

(b) Upon satisfactory proof of participation and eligibility in the Medi-Cal program, a Medi-Cal beneficiary shall receive a 50 percent reduction in the fees established pursuant to this section.

11362.76. (a) A person who possesses an identification card shall:

(1) Within seven days, notify the county health department or the county's designee of any change in the person's attending physician or designated primary caregiver, if any.

(2) Annually submit to the county health department or the county's designee the following:

(A) Updated written documentation of the person's serious medical condition.

(B) The name and duties of the person's designated primary caregiver, if any, for the forthcoming year.

(b) If a person who possesses an identification card fails to comply with this section, the card shall be deemed expired. If an identification card expires, the identification card of any designated primary caregiver of the person shall also expire.

(c) If the designated primary caregiver has been changed, the previous primary caregiver shall return his or her identification card to the department or to the county health department or the county's designee.

(d) If the owner or operator or an employee of the owner or operator of a provider has been designated as a primary caregiver pursuant to paragraph (1) of subdivision (d) of Section 11362.7, of the qualified patient or person with an identification card, the owner or operator shall notify the county health

department or the county's designee, pursuant to Section 11362.715, if a change in the designated primary caregiver has occurred.

11362.765. (a) Subject to the requirements of this article, the individuals specified in subdivision (b) shall not be subject, on that sole basis, to criminal liability under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570. However, nothing in this section shall authorize the individual to smoke or otherwise consume marijuana unless otherwise authorized by this article, nor shall anything in this section authorize any individual or group to cultivate or distribute marijuana for profit.

(b) Subdivision (a) shall apply to all of the following:

(1) A qualified patient or a person with an identification card who transports or processes marijuana for his or her own personal medical use.

(2) A designated primary caregiver who transports, processes, administers, delivers, or gives away marijuana for medical purposes, in amounts not exceeding those established in subdivision (a) of Section 11362.77, only to the qualified patient of the primary caregiver, or to the person with an identification card who has designated the individual as a primary caregiver.

(3) Any individual who provides assistance to a qualified patient or a person with an identification card, or his or her designated primary caregiver, in administering medical marijuana to the qualified

patient or person or acquiring the skills necessary to cultivate or administer marijuana for medical purposes to the qualified patient or person.

(c) A primary caregiver who receives compensation for actual expenses, including reasonable compensation incurred for services provided to an eligible qualified patient or person with an identification card to enable that person to use marijuana under this article, or for payment for out-of-pocket expenses incurred in providing those services, or both, shall not, on the sole basis of that fact, be subject to prosecution or punishment under Section 11359 or 11360.

11362.77. (a) A qualified patient or primary caregiver may possess no more than eight ounces of dried marijuana per qualified patient.

In addition, a qualified patient or primary caregiver may also maintain no more than six mature or 12 immature marijuana plants per qualified patient.

(b) If a qualified patient or primary caregiver has a doctor's recommendation that this quantity does not meet the qualified patient's medical needs, the qualified patient or primary caregiver may possess an amount of marijuana consistent with the patient's needs.

(c) Counties and cities may retain or enact medical marijuana guidelines allowing qualified patients or primary caregivers to exceed the state limits set forth in subdivision (a).

(d) Only the dried mature processed flowers of female cannabis plant or the plant conversion shall be considered when determining allowable quantities of marijuana under this section.

(e) The Attorney General may recommend modifications to the possession or cultivation limits set forth in this section. These recommendations, if any, shall be made to the Legislature no later than December 1, 2005, and may be made only after public comment and consultation with interested organizations, including, but not limited to, patients, health care professionals, researchers, law enforcement, and local governments. Any recommended modification shall be consistent with the intent of this article and shall be based on currently available scientific research.

(f) A qualified patient or a person holding a valid identification card, or the designated primary caregiver of that qualified patient or person, may possess amounts of marijuana consistent with this article.

11362.775. Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570.

11362.78. A state or local law enforcement agency or officer shall not refuse to accept an identification card issued by the department unless the state or local law enforcement agency or officer has reasonable cause to believe that the information contained in the card is false or fraudulent, or the card is being used fraudulently.

11362.785. (a) Nothing in this article shall require any accommodation of any medical use of marijuana on the property or premises of any place of employment or during the hours of employment or on the property or premises of any jail, correctional facility, or other type of penal institution in which prisoners reside or persons under arrest are detained.

(b) Notwithstanding subdivision (a), a person shall not be prohibited or prevented from obtaining and submitting the written information and documentation necessary to apply for an identification card on the basis that the person is incarcerated in a jail, correctional facility, or other penal institution in which prisoners reside or persons under arrest are detained.

(c) Nothing in this article shall prohibit a jail, correctional facility, or other penal institution in which prisoners reside or persons under arrest are detained, from permitting a prisoner or a person under arrest who has an identification card, to use marijuana for medical purposes under circumstances that will not endanger the health or safety of other prisoners or the security of the facility.

(d) Nothing in this article shall require a governmental, private, or any other health insurance provider or health care service plan to be liable for any claim for reimbursement for the medical use of marijuana.

11362.79. Nothing in this article shall authorize a qualified patient or person with an identification card to engage in the smoking of medical marijuana under any of the following circumstances:

(a) In any place where smoking is prohibited by law.

(b) In or within 1,000 feet of the grounds of a school, recreation center, or youth center, unless the medical use occurs within a residence.

(c) On a schoolbus.

(d) While in a motor vehicle that is being operated.

(e) While operating a boat.

11362.795. (a) (1) Any criminal defendant who is eligible to use marijuana pursuant to Section 11362.5 may request that the court confirm that he or she is allowed to use medical marijuana while he or she is on probation or released on bail.

(2) The court's decision and the reasons for the decision shall be stated on the record and an entry stating those reasons shall be made in the minutes of the court.

(3) During the period of probation or release on bail, if a physician recommends that the probationer or

defendant use medical marijuana, the probationer or defendant may request a modification of the conditions of probation or bail to authorize the use of medical marijuana.

(4) The court's consideration of the modification request authorized by this subdivision shall comply with the requirements of this section.

(b)(1) Any person who is to be released on parole from a jail, state prison, school, road camp, or other state or local institution of confinement and who is eligible to use medical marijuana pursuant to Section 11362.5 may request that he or she be allowed to use medical marijuana during the period he or she is released on parole.

A parolee's written conditions of parole shall reflect whether or not a request for a modification of the conditions of his or her parole to use medical marijuana was made, and whether the request was granted or denied.

(2) During the period of the parole, where a physician recommends that the parolee use medical marijuana, the parolee may request a modification of the conditions of the parole to authorize the use of medical marijuana.

(3) Any parolee whose request to use medical marijuana while on parole was denied may pursue an administrative appeal of the decision. Any decision on the appeal shall be in writing and shall reflect the reasons for the decision.

(4) The administrative consideration of the modification request authorized by this subdivision shall comply with the requirements of this section.

11362.8. No professional licensing board may impose a civil penalty or take other disciplinary action against a licensee based solely on the fact that the licensee has performed acts that are necessary or appropriate to carry out the licensee's role as a designated primary caregiver to a person who is a qualified patient or who possesses a lawful identification card issued pursuant to Section 11362.72.

However, this section shall not apply to acts performed by a physician relating to the discussion or recommendation of the medical use of marijuana to a patient. These discussions or recommendations, or both, shall be governed by Section 11362.5.

11362.81. (a) A person specified in subdivision (b) shall be subject to the following penalties:

(1) For the first offense, imprisonment in the county jail for no more than six months or a fine not to exceed one thousand dollars ($1,000), or both.

(2) For a second or subsequent offense, imprisonment in the county jail for no more than one year, or a fine not to exceed one thousand dollars ($1,000), or both.

(b) Subdivision (a) applies to any of the following:

(1) A person who fraudulently represents a medical condition or fraudulently provides any material

misinformation to a physician, county health department or the county's designee, or state or local law enforcement agency or officer, for the purpose of falsely obtaining an identification card.

(2) A person who steals or fraudulently uses any person's identification card in order to acquire, possess, cultivate, transport, use, produce, or distribute marijuana.

(3) A person who counterfeits, tampers with, or fraudulently produces an identification card.

(4) A person who breaches the confidentiality requirements of this article to information provided to, or contained in the records of, the department or of a county health department or the county's designee pertaining to an identification card program.

(c) In addition to the penalties prescribed in subdivision (a), any person described in subdivision (b) may be precluded from attempting to obtain, or obtaining or using, an identification card for a period of up to six months at the discretion of the court.

(d) In addition to the requirements of this article, the Attorney General shall develop and adopt appropriate guidelines to ensure the security and nondiversion of marijuana grown for medical use by patients qualified under the Compassionate Use Act of 1996.

11362.82. If any section, subdivision, sentence, clause, phrase, or portion of this article is for any reason held invalid or unconstitutional by any court of competent jurisdiction, that portion shall be

deemed a separate, distinct, and independent provision, and that holding shall not affect the validity of the remaining portion thereof.

11362.83. Nothing in this article shall prevent a city or other local governing body from adopting and enforcing laws consistent with this article.

132

No. 08-887

Supreme Court
APR 14 2009
OFFICE OF THE CLERK

# Supreme Court of the United States

SAN DIEGO COUNTY, CALIFORNIA, *et al.*,

*Petitioners*,

—v.—

SAN DIEGO NORML, *et al.*,

*Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

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## QUESTION PRESENTED

Respondents argue below (at Part I, *infra*) that Petitioners' lack of Article III standing to obtain a ruling from this Court regarding whether key provisions of California's medical marijuana law are preempted by federal law, renders this case an inappropriate vehicle for review. Aside from that impediment to certiorari, on the merits the question presented is

> Does the federal Controlled Substances Act preempt the provision of California's Medical Marijuana Program Act that requires counties to issue identification cards to help state law enforcement officers distinguish between conduct that is criminal and conduct that is not criminal under state law?

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondents hereby make the following disclosures:

1) There are no parent corporations for any of the Respondents; and

2) No public corporation owns 10% or more stock in any of the Respondents.

## TABLE OF CONTENTS

QUESTION PRESENTED ..... i

CORPORATE DISCLOSURE STATEMENT ..... ii

TABLE OF AUTHORITIES ..... iii

STATEMENT OF THE CASE ..... 1

REASONS FOR DENYING THE PETITION ..... 5

I. Review Should Be Denied Because the Counties Lack Standing To Raise The Question Whether California's Decriminalization of Medical Marijuana Is Preempted. ..... 6

II. Resolution by This Court Is Unnecessary, Because There Is No Split of Authority on the Issues Presented. ..... 12

III. The Court Below Correctly Applied Settled Law in Rejecting the Counties' Preemption Claim. ..... 14

CONCLUSION ..... 24

## TABLE OF AUTHORITIES

**Cases**

*Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) ..... 23

*Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) ..... 15

*City of Garden Grove v. Superior Court*, No. 07-1569 (S. Ct. filed Oct. 23, 2008) ..... 10

*City of Garden Grove v. Superior Court*, 157 Cal. App. 4th 355 (Cal. Ct. App. 2007), *cert. denied*, 129 S. Ct. 623 (2008) ..... 10

*Doremus v. Bd. of Educ.*, 342 U.S. 429 (1952) ..... 7

*Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) ..... 9, 11

*English v. Gen. Elec. Co.*, 496 U.S. 72 (1990) ..... 15

*Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) ..... 16

*Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995) ... 17

*Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992) ..... 16

*Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) ..... 22

*Gonzales v. Oregon*, 546 U.S. 243 (2006) ..... 18, 22, 23

*Hines v. Davidowitz*, 312 U.S. 52 (1941) ..... 18

*Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) ..... 7, 9

*New York v. United States*, 505 U.S. 144 (1992) ..... 20

*Printz v. United States*, 521 U.S. 898 (1997).....19, 20

*Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).....14

*S. Blasting Servs., Inc. v. Wilkes County*, 288 F.3d 584 (4th Cir. 2002).....17

*Schlesinger v. Reservists Comm. To Stop the War*, 418 U.S. 208 (1974).....11

*Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002)...22

*Sprint Communications Co. v. APCC Servs., Inc.*, 128 S. Ct. 2531 (2008).....7

*Tileston v. Ullman*, 318 U.S. 44 (1943) (per curiam).....7

*Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982).....11

*Wyeth v. Levine*, 129 S. Ct. 1187 (2009).....16, 22, 23

**Statutes**

18 U.S.C. § 848.....17

18 U.S.C. § 922.....21

18 U.S.C. § 2422.....21

21 U.S.C. § 801.....1

21 U.S.C. § 841.....3

21 U.S.C. § 844.....3

21 U.S.C. § 881.....19

21 U.S.C. § 903.....3, 15, 17, 23

Alaska Stat. § 17.37.010.....1, 13

Cal. Health & Saf. Code § 11362.5 ..... 1, 2, 6
Cal. Health & Saf. Code §§ 11362.7 – 11362.83 ... 2, 13
Cal. Health & Saf. Code § 11362.71 ..... 2, 13
Cal. Health & Saf. Code § 11362.72 ..... 2
Cal. Health & Saf. Code § 11362.755 ..... 11
Colo. Const. art. 18, sec. 14 ..... 1, 13
Conn. Gen. Stat. § 53a-90a ..... 21
Haw. Rev. Stat. § 329-121 ..... 1
Haw. Rev. Stat. § 329-123 ..... 13
Idaho Code Ann. § 18-3302A ..... 21
Me. Rev. Stat. Ann. tit. 22 § 2383-B ..... 1
Mich. Comp. Laws § 333.26421 ..... 1
Mich. Comp. Laws § 333.26424 ..... 13
Mont. Code Ann. § 50-46-201 ..... 1, 13
Mont. Code Ann. § 50-46-101 ..... 1
N.M. Stat. Ann. § 30-31-27.1 ..... 21
N.M. Stat. Ann. § 26-2B-1 ..... 1
N.M. Stat. Ann. § 26-2B-4 ..... 13
N.M. Stat. Ann. § 30-31-27.1 ..... 21
Nev. Rev. Stat. § 453A.010 ..... 1
Nev. Rev. Stat. § 453A.200 ..... 13
Or. Rev. Stat. § 475.300 ..... 1
Or. Rev. Stat. § 475.306 ..... 13
R.I. Gen. Laws § 21-28.6-1 ..... 1

R.I. Gen. Laws § 21-28.6-4 ..... 13
Tex. Penal Code Ann. § 46.06 ..... 21
Vt. Stat. Ann. tit. 18, § 4472 ..... 1
Vt. Stat. Ann. tit. 18, § 4473 ..... 13
Wash. Rev. Code § 69.51A.005 ..... 1
Wis. Stat. § 948.075 ..... 21

## STATEMENT OF THE CASE

For years, states have charted their own paths regarding penal drug statutes. Some states have made their laws more severe than federal law, some less severe, and some have completely decriminalized the possession of small amounts of marijuana. Never before this case has it been suggested that the decades-old federal Controlled Substances Act, 21 U.S.C. § 801 *et seq.* ("CSA"), preempts state drug laws because the state has not criminalized a portion of the conduct prohibited by the CSA. This novel and baseless contention is the gravamen of the petition for certiorari in this case.

California is one of thirteen states in which the use of marijuana for medical purposes (and only for those purposes) is not a criminal offense under state law.[1] In 1996, California voters enacted the Compassionate Use Act ("CUA"), which narrowed the reach of state marijuana law by exempting seriously ill Californians and their caregivers from prosecution under state law if they possess or cultivate marijuana for "personal medical purposes" with a physician's recommendation. Cal. Health & Saf. Code § 11362.5(d). The Act's only other command dictates

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[1] The other twelve are Alaska, Colorado, Hawaii, Maine, Michigan, Montana, Nevada, New Mexico, Oregon, Rhode Island, Vermont and Washington. *See* Alaska Stat. § 17.37.010 *et seq.*; Colo. Const. art. 18, sec. 14; Haw. Rev. Stat. § 329-121 *et seq.*; Me. Rev. Stat. Ann. tit. 22, § 2383-B(5); Mich. Comp. Laws § 333.26421 *et seq.*; Mont. Code Ann. §§ 50-46-101 *et seq.*, 50-46-201 *et seq.*; Nev. Rev. Stat. § 453A.010 *et seq.*; N.M. Stat. Ann. § 26-2B-1 *et seq.*; Or. Rev. Stat. § 475.300 *et seq.*; R.I. Gen. Laws § 21-28.6-1 *et seq.*; Vt. Stat. Ann. tit. 18, § 4472 *et seq.*; Wash. Rev. Code § 69.51A.005 *et seq.*

that a physician shall not be punished for recommending marijuana to a patient for medical purposes. Cal. Health & Saf. Code § 11362.5(c).

In 2003, California enacted the Medical Marijuana Program Act, Cal. Health & Saf. Code §§ 11362.7-11362.83 ("MMP"), which fleshed out how the State would implement the CUA. To help California's law enforcement officers distinguish individuals whose possession and use of marijuana is not criminal under state law, from individuals whose possession and use is criminal, the MMP established among its implementation mechanisms a voluntary identification-card program under which medical-marijuana patients and caregivers may apply for a card, subject to verification procedures established by statute, that identifies the bearer as someone who uses or possesses marijuana for medical purposes. *See* Cal. Health & Saf. Code §§ 11362.71, 11362.72. A person in possession of a valid identification card is not subject to arrest under California law except under specified circumstances, Cal. Health & Saf. Code § 11362.71(e), though nothing in the MMP (or any other state law) purports to exempt card-holders from arrest or prosecution under federal law. Indeed, as the California Court of Appeal noted in the decision below, "the applications for the card expressly state the card will not insulate the bearer from federal laws, and the card itself does not imply the holder is immune from prosecution for federal offenses." App. of Pet'r San Diego County (hereinafter "Pet. App.") 35.

The federal Controlled Substances Act criminalizes the possession, manufacture, and

distribution of marijuana. *See* 21 U.S.C. §§ 841(a), 844(a). But the CSA also allows the states to continue their longstanding practice of enacting widely varying penal drug laws. Specifically, Congress included an express anti-preemption clause in the CSA, under which preemption is limited to the narrow set of circumstances in which there is a "positive conflict" between state and federal law. 21 U.S.C. § 903. Thus Congress accorded the states wide latitude to define the scope of their own penal drug laws and to decide how to enforce them.

Petitioners San Diego County and San Bernardino County ("the Counties"), both political subdivisions of the State of California, filed separate suits claiming that the MMP and certain sections of the CUA are preempted under federal law. Significantly, as the California Court of Appeal noted, Petitioners "did not claim below, and do not assert on appeal, that the exemption from state criminal prosecution for possession or cultivation of marijuana provided by [the CUA] is unconstitutional." Pet. App. 3.

The original defendants in the San Diego suit, who are all Respondents before this Court, were the State of California, one of its officers, and a non-governmental advocacy organization promoting the reform of marijuana laws. Pet. App. 50. A group of patients and caregivers intervened as defendants and are also Respondents here. Pet. App. 50-51. Petitioner San Bernardino sued only California and a state official. Pet. App. 50. The two cases were consolidated in the state trial court and remained

consolidated in the appellate court. Pet. App. 10-11, 50.[2]

Construing the CUA and MMP as protecting medical marijuana users only under state, but not federal, law, Pet. App. 56, the state trial court granted Respondents' motions for judgment on the pleadings and held that the CUA and MMP are not preempted by the CSA. Pet. App. 58, 60.

The California Court of Appeal affirmed. Pet. App. 47. The court held first that even under California's liberal standing jurisprudence, the Counties lack standing to challenge all but the identification-card provisions of the MMP because none of the other provisions at issue requires the Counties to do anything or injures them in any way. Pet. App. 20-21. As to the merits of the remaining claims, the court held that the federal CSA does not preempt the identification-card provisions of the MMP because Congress expressly disclaimed an intent to occupy the field of drug regulation, Pet. App. 23, and because the implementation of the identification-card provisions neither conflicts with federal law nor poses an obstacle to the achievement of federal objectives. Pet. App. 28-41. The California Supreme Court denied review. Pet. App. 68.

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[2] The organizations and individuals who submit this brief are Respondents only in the San Diego case, but because of the history of consolidated argument and decision, this brief will address the arguments advanced by both Counties. Both Counties' petitions should be denied for the same reasons.

## REASONS FOR DENYING THE PETITION

This Court should deny the petition for certiorari because this case is a poor vehicle for addressing the issue that the Counties ask the Court to address, because there is no split of authority on the questions decided by the lower court, and because in any event the decision below was correct. This case's weakness as a candidate for certiorari is reflected in the Counties' ambivalence about what is truly at stake in this case. The Counties have been very careful not to challenge the heart of California's medical marijuana laws—the decriminalization provision—presumably because they realize the State has a sovereign right to decide what should and should not be criminal under its own laws. Yet, at the same time, the Counties insist that their challenge to other provisions of California's medical marijuana regime necessarily implicates, and should force a decision about, the very provision the Counties have gone out of their way not to challenge.

As explained in more detail below, the Counties' challenge ultimately fails either way. They cannot invoke this Court's review of the decriminalization provision because they have failed to raise it below. They lack standing to do so anyway because state-law decriminalization does not create an injury in fact to the Counties, so all this Court is left with is a challenge to California's identification-card system. And the Court of Appeal was correct to reject that challenge for the same reasons California's decriminalization provision is constitutional: states have the sovereign right to choose what to make criminal under their own laws and, as a corollary, to

enable their officers to distinguish what is criminal from what is not under state law. For all of these reasons, certiorari should be denied.

## I. Review Should Be Denied Because the Counties Lack Standing To Raise The Question Whether California's Decriminalization of Medical Marijuana Is Preempted.

At most, petitioners have standing in this Court to challenge only one ancillary aspect of the MMP—the identification-card program. They do not have standing to raise what they characterize as the "important question" this case presents, Pet. of San Diego County 13, that is, whether federal law preempts California's law decriminalizing the use by qualified patients, under a physician's recommendation, of small amounts of marijuana for medical purposes. *See* Cal. Health & Saf. Code § 11362.5(d). In fact, the Counties explicitly disclaim such a challenge, and always have. Pet. of San Diego County 26 n.7 ("Only one provision of the statute actually exempts individuals from prosecution under California law, and the County does not challenge that provision."); *see also* Pet. App. 3 (decision below) (noting that the Counties "did not claim below, and do not assert on appeal, that the exemption from state criminal prosecution for possession or cultivation of marijuana . . . is unconstitutional"). Thus the issue presented for decision is not (as the Counties would now have it) whether California's decision not to criminalize the "use, possess[ion] and cultivat[ion] of marijuana for medical purposes[] is preempted under the Supremacy Clause," Pet. of San Diego County, at

*i*, but rather the much smaller issue of whether California's identification-card program is preempted. That issue is not worthy of this Court's attention, and so certiorari should be denied for this reason alone.

1. The Court of Appeal appropriately restricted the scope of its decision to the MMP's identification-card program, because the Counties "do not have standing to challenge those portions of the MMP and CUA that are not applicable to them and that do not injuriously affect them." Pet. App. 20.

The California courts, like other state courts, may establish their own rules of standing for adjudication in their own courts, but once a case arrives in this Court, Article III standing requirements apply. *See, e.g., Doremus v. Bd. of Educ.*, 342 U.S. 429, 434 (1952); *Tileston v. Ullman*, 318 U.S. 44, 46 (1943) (per curiam). Those requirements are at least as strict as the California-law standing requirements applied by the Court of Appeal below. "[I]n order to have Article III standing, a plaintiff must adequately establish . . . an injury in fact," that is, "a 'concrete and particularized' invasion of a 'legally protected interest.'" *Sprint Communications Co. v. APCC Servs., Inc.*, 128 S. Ct. 2531, 2535 (2008) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The MMP's identification-card provisions aside, in challenging California's medical marijuana laws, the Counties do not seek to vindicate their legally protected interests because those laws do not provide any rights to, or impose any obligations on, California's counties. The Counties do not disagree. Nowhere in their petitions to this Court do the Counties maintain that the CUA

or any aspect of the MMP, other than the identification-card program, requires the Counties to engage in any conduct or bestows any rights on them.

Thus the Counties' case, even if successful, would leave in place the basic decriminalization provision of the CUA and its prohibition against punishment of physicians, as well as numerous MMP provisions fleshing out how these provisions are applied. The Court should not grant review to consider only the tangential question whether the identification-card provisions are preempted by federal law.

Recognizing that resolution of their claims regarding the identification-card provisions alone would leave all of the CUA and much of the MMP unaffected, the Counties claim that they have standing to challenge other provisions of both laws. San Diego argues that the Court of Appeal erred in restricting its analysis to the identification-card requirement because "[i]t is apparent that the key issue presented in this case is whether the provisions of the Medical Marijuana Law, which authorize individuals to engage in conduct that violates the CSA, are preempted." Pet. of San Diego County 34. That may be the "key issue" of concern to San Diego County, but it is not the "key issue" that this case presents—first, because the Counties never challenged California's decriminalization provision; and second, because the Counties would not have standing even if they had challenged it. If, as San Diego argues, the decriminalization issue is what ought to be addressed, it would be fruitless for this

Court to grant review in this case, which presents the identification-card issue alone.

The Counties also claim they should be granted standing as a matter of necessity, because others who might disagree with California's medical marijuana laws do not themselves have standing. As San Diego puts it, California citizens "claiming that the Medical Marijuana Law is preempted would not be able to show they personally are harmed by other people's use of marijuana for medical purposes." Pet. of San Diego County 37. Whether or not that is true, it is irrelevant to the standing inquiry. No one, the Counties included, has a legally protected interest in the abstract and widely-shared desire to ensure that only valid laws are in force. As this Court has said, "a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74; *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (standing doctrine prevents federal courts from "decid[ing] abstract questions of wide public significance" because "other governmental institutions may be more competent to address the questions" (citation and internal quotation marks omitted)).

Relatedly, San Bernardino County points out that California courts appear to allow standing "if for no other reason than the public importance of the issue presented," Pet. of San Bernardino County 16

(citing *City of Garden Grove v. Superior Court*, 157 Cal. App. 4th 355 (Cal. Ct. App. 2007), *cert. denied*, 129 S. Ct. 623 (2008)), and pleads with *this* Court to resolve a purported split in *California* authority on that question. The answer to that argument is simple: California courts need not adhere to the strict Article III limits on federal-court adjudication that this Court is obliged to follow. Indeed, in *Garden Grove*, the decision on which San Bernardino relies for its view that standing should be granted whenever the issue presented is one of "public importance," the California Court of Appeal acknowledged that the City did *not* have standing under "the federal injury in fact test," 157 Cal. App. 4th at 366-70, but nonetheless held that "public policy considerations dictate that we afford the City standing," *id.* at 365, based on loose state-law principles favoring standing where a "party may otherwise find it difficult or impossible to challenge the decision at issue." *Id.* at 371 (citing California law).[3] Here, by contrast, Article III applies, and this Court has long recognized that "[t]he assumption that if [particular plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing" under Article III. *Schlesinger v. Reservists*

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[3] In *Garden Grove*, after losing on the merits, the City sought review in this Court, and the respondent opposed certiorari on the ground, among others, that even though California courts were willing to hear the case, the City lacked Article III standing to obtain review in this Court. Respondent Kha's Br. in Opp. 4-7, *City of Garden Grove v. Superior Court*, No. 07-1569 (S. Ct. filed Oct. 23, 2008). This Court denied review. 129 S. Ct. 623 (2008).

*Comm. To Stop the War*, 418 U.S. 208, 227 (1974); *accord Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 489 (1982).

2. At most, the question for decision in this case is whether federal law preempts California's identification-card provisions. But this Court's prudential standing doctrine counsels against reviewing even that narrow question. In order to determine whether the Counties have suffered an injury in fact by virtue of the identification card requirements, this Court must look to a difficult issue of unresolved state law. "When hard questions of [state law] are sure to affect the outcome [of the standing analysis], the prudent course is for the federal court to stay its hand." *Newdow*, 542 U.S. at 17. It is not at all clear, in the absence of guidance from the California Supreme Court, whether the Counties have suffered a legally cognizable injury.

The MMP specifically authorizes counties to charge identification-card applicants a fee sufficient to allow recovery of "all costs incurred by the county" for administering the card program, Cal. Health & Saf. Code § 11362.755(a), thus enabling counties to insulate themselves from any injuries that otherwise might be imposed by the program and rendering the Counties' role under the MMP wholly ministerial. When presented with the question, the California Supreme Court may well hold that, in light of this "hold harmless" provision, California's counties are not injured by the MMP's identification-card requirement. Such a state-law holding would negate a county's Article III standing to challenge even the

identification-card aspect of California's medical marijuana law because the county would then lack a legally protected interest under California law. Because of this possibility, this Court's prudential standing doctrines counsels in favor of awaiting an authoritative state-law determination from the California Supreme Court on the question whether the identification-card provisions invade any legally protected interest of the Counties under state law, instead of wading into the murky question of state law as a prerequisite to considering the validity of the identification-card provisions under the Supremacy Clause.

For a variety of reasons, then, this case is not an appropriate vehicle for considering whether California's medical marijuana laws are preempted, and review should be denied.

## II. Resolution by This Court Is Unnecessary, Because There Is No Split of Authority on the Issues Fresented.

The Counties do not suggest, nor are Respondents aware of, any split of authority regarding the issue decided below: whether a medical marijuana identification-card program is preempted by the CSA. Thirteen states have decriminalized medical marijuana since 1996. Eleven of these states issue identification cards or similar documentation to assist law enforcement in distinguishing between legitimate patients and those whose marijuana use

remains illegal under state law.[4] To Respondents' knowledge, in the intervening years, only the Petitioners in this case have argued that any aspect of any state's medical marijuana regime is preempted by federal law. In this case, all four judges to consider this contention rejected it, and the case did not warrant the attention of the California Supreme Court. There are no other cases addressing this issue. Thus there is no lower-court conflict in need of this Court's resolution, and given the lack of other litigation, no prospect of such a conflict.

Petitioner San Bernardino County attempts to raise the specter of a circuit split by pointing out that various lower courts disagree on the question whether a political subdivision has standing to raise federal constitutional claims against its parent state in federal court, *see* Pet. of San Bernardino County 18-19—but this question is not implicated by the decision below, which, as explained in the previous section, held that the Counties lacked standing to bring most of their claims because they lacked a concrete injury. *See* Pet. App. 20 (Petitioners "do not have standing to challenge those portions of the MMP and CUA that are not applicable to them and that do not injuriously affect them"). The standing question here is merely whether, assuming that political subdivisions *do* have a right to sue on Supremacy

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[4] *See* Alaska Stat. § 17.37.010; Cal. Health & Saf. Code § 11362.71; Colo. Const. art. 18, sec. 14(2)(b); Haw. Rev. Stat. § 329-123(b); Mich. Comp. Laws § 333.26424(a); Mont. Code Ann. § 50-46-201(1); Nev. Rev. Stat. § 453A.200(1); N.M. Stat. Ann. § 26-2B-4(D); Or. Rev. Stat. § 475.306(1); R.I. Gen. Laws § 21-28.6-4(a); Vt. Stat. Ann. tit. 18, § 4473(b).

Clause grounds to invalidate state laws adopted by their parent states, the Counties here have suffered an injury-in-fact sufficient to allow them to access to federal court, which is a bedrock requirement of any federal adjudication. There is no circuit split on that question nor is there any serious dispute that the Counties have failed to demonstrate any injury-in-fact from California's medical marijuana laws (with the possible exception of the identification-card provision).

## III. The Court Below Correctly Applied Settled Law in Rejecting the Counties' Preemption Claim.

Review is also unwarranted because the decision below applied settled legal principles to reach a correct result. The California Court of Appeal held that California's identification-card program is not preempted by the CSA because the CSA expressly disclaims any congressional intent to occupy the field, there is no positive conflict between federal and California law, and the issuance of identification cards to individuals who cannot be punished under state law for their medical marijuana use in no way interferes with the ability of federal officers to enforce federal law.

1. In its preemption analysis, this Court "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

Because congressional purpose is the "touchstone" of preemption analysis, *Cipollone*, 505 U.S. at 516, "when Congress has made its intent known through explicit statutory language, the courts' task is an easy one." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

Here, the Court's task is easy indeed. In enacting the CSA, Congress explicitly stated its intent to preempt only those state laws that are in "positive conflict" with the federal law:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

21 U.S.C. § 903.

In section 903, Congress made two points clear. First, Congress expressly disclaimed "an intent . . . to occupy the field" of drug regulation, "including criminal penalties." *Id.* Thus there is no field preemption here, as the Court of Appeal correctly held, *see* Pet. App. 23, and the Counties do not argue otherwise.

Second, Congress made clear that it wished to limit the scope of preemption under the CSA to

circumstances in which "there is a *positive conflict* between [a CSA provision] and [a] State law *so that the two cannot consistently stand together.*" 21 U.S.C. § 903 (emphasis added). This Court has long understood this type of positive conflict to arise where "compliance with both federal and state regulations is a physical impossibility." *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *see also Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992). The California medical marijuana laws under attack here do not create such an impossibility. Nothing in the CUA or MMP requires the Counties (or anyone else) to do something that federal law forbids. All that the Counties must do is issue identification cards to help state officers ascertain the status of certain individuals under state law. Clearly, it is possible for the Counties to comply with all applicable provisions of the federal CSA, and at the same time to comply with state law by issuing identification cards to medical marijuana patients so that state officers will know their marijuana use is not criminal under state law. This Court has recently reiterated that "[i]mpossibility pre-emption is a demanding [standard]." *Wyeth v. Levine*, 129 S. Ct. 1187, 1999 (2009). That standard is not satisfied here.

As the Court of Appeal correctly held, the absence of a positive conflict is dispositive in this case. *See* Pet. App. 30-34. Although an express statutory provision defining the scope of intended preemption does not entirely foreclose "any possibility of implied preemption," *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995), an express anti-preemption

clause is nonetheless an important signal regarding congressional intent, and this Court has treated it as such. At a minimum, such clauses can provide "a reliable indicium of congressional intent." *Id.* The anti-preemption clause of the CSA provides much more than that. In unambiguous language, it preserves every state law concerning controlled substances "unless there is a *positive conflict* between [the CSA] and that State law *so that the two cannot consistently stand together.*" 21 U.S.C. § 903 (emphasis added). As the Court of Appeal properly recognized, this language is susceptible to just one reasonable interpretation: Congress intended to preempt only state laws in positive conflict with the CSA, and no others. *See* Pet. App. 30-34 (opinion below, reaching this conclusion); *see also S. Blasting Servs., Inc. v. Wilkes County*, 288 F.3d 584, 590-91 (4th Cir. 2002) (interpreting 18 U.S.C. § 848, whose language is materially identical to 21 U.S.C. § 903, to permit preemption only in "cases of an actual conflict . . . such that compliance with both federal and state regulations is a physical impossibility" (citation and internal quotations marks omitted)). When Congress has expressed its intent on preemption so specifically and unmistakably, "there is no need to infer congressional intent to pre-empt state laws" from elsewhere in the statute. *Freightliner*, 514 U.S. at 288 (citations and internal quotation marks omitted).

2. Lacking any support in the text of the CSA, Petitioners ask this Court to find that Congress, after making its intent clear through the CSA's explicit "positive conflict" language, nonetheless implicitly intended a broader scope of preemption under the

theory that the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (finding that federal immigration law implicitly preempted a state immigration law because of the federal government's sovereign power in the field of international relations). The Court of Appeal was correct to reject obstacle preemption here. As this Court has recognized, the CSA "explicitly contemplates a role for the States in regulating controlled substances." *Gonzales v. Oregon*, 546 U.S. 243, 251 (2006). In the absence of a congressional judgment that a single uniform standard of criminal conduct is necessary to the accomplishment of federal objectives, no conflict can exist between the federal government's decision to make certain conduct criminal under federal law and several states' (including California's) decision not to also make that conduct criminal under state law—which the Counties do not challenge—and in turn to adopt measures assisting local law enforcement by facilitating the identification of persons not subject to arrest or prosecution under state law.

Even assuming that implied obstacle preemption can exist under the CSA, a state identification card that does not purport to exempt anyone from the requirements of federal law poses no obstacle to its enforcement. Although California has directed its own officers to pay heed to the identification card in enforcing state law, federal officers are free to ignore it when enforcing federal law. The card does not prevent federal officers from investigating federal drug crimes, nor from arresting

individuals suspected of federal drug crimes, nor from prosecuting individuals for federal drug crimes, nor from applying the CSA's property-forfeiture provisions, *see* 21 U.S.C. § 881. Nor does the card purport to do any of these things. *See* Pet. App. 35 (decision below) (observing that "the applications for the card expressly state the card will not insulate the bearer from federal laws, and the card itself does not imply the holder is immune from prosecution for federal offenses"). Possession of a state-issued piece of paper, even one that has official state purposes, does not stand in the way of the federal government's enforcement of federal criminal law, any more than a California prosecutor's decision not to prosecute a suspect under any state law would bar a federal prosecution, under federal law, of the same person for the same conduct.

The mere fact that state and federal criminal law do not march in lockstep does not create a conflict; on the contrary, under the principles of state sovereignty this Court articulated in *Printz v. United States*, 521 U.S. 898 (1997), "state legislatures are *not* subject to federal direction," *id.* at 912 (emphasis in original). More specifically, "'[e]ven where Congress has the authority . . . to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.'" *Id.* at 924 (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)). If the Counties were correct that a state's decision not to criminalize the same conduct as federal law stands as an obstacle to that law and is therefore preempted, the result would be precisely what *Printz* forbids: Federal law would force

States to enact criminal prohibitions that mirror those of federal law. This Court, mindful of the careful balance of dual sovereignties established by the Constitution, has never countenanced such a far-reaching preemption doctrine, and the Court of Appeal was right to reject it.

The Counties nonetheless characterize California's decriminalization of medical marijuana and its system for implementing that decision as "thwart[ing] federal law," Pet. of San Bernardino County 6, and as providing a "get-out-of-jail-free" card for violations of federal law, *id.* at 10. These characterizations suffer from the same fatal flaw: They assume that state criminal law must march in lockstep with federal criminal law or else be preempted. But a State's decision to exercise its constitutional right not to enact or administer a federal regulatory program, *see Printz*, 521 U.S. at 933, does not unconstitutionally "thwart federal law," and the Counties fail to mention that what they dub California's "get-out-of-jail-free" cards save the bearer only from California, and not federal, jails. Respondents are unaware of any case, and the Counties have cited none, where federal criminal law was held to preempt a state's penal code because the state law did not criminalize the exact same conduct that federal law did, or because state law provided an efficient means for state and local officers to determine whom to arrest for violations of state law. Thus the Court of Appeal's rejection of the Counties' implied preemption arguments is correct and consistent with this Court's preemption jurisprudence.

Were it otherwise, the scope of federal preemption in the field of criminal law would be staggering: All state criminal law regimes—including criminal drug law regimes—that criminalized a smaller set of conduct than federal criminal law would be preempted under the theory the Counties advance. There are thousands of such state laws, which the States have a sovereign right to enact.[5] Under the Counties' novel and sweeping view of obstacle preemption, every one of these laws would be preempted because they would pose an obstacle to achieving the goals of the more restrictive federal law. This cannot be correct, as it would give preemptive effective to each one of the "countless . . . federal criminal provisions [that prohibit] conduct

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[5] For example, some states permit the sale of a handgun to an individual 18 to 21 years old, even though federal law forbids such conduct. *Compare, e.g.*, Idaho Code Ann. § 18-3302A (state restriction on gun sales applies only to purchasers under 18 years old); Tex. Penal Code Ann. § 46.06(a)(2) (same), *with* 18 U.S.C. § 922(b)(1) (federal restriction on gun sales applies to purchasers under 21, unless the gun is a shotgun or rifle). Some states do not criminalize the solicitation of 16- and 17-year-olds for sexual activity, even though federal law prohibits it. *Compare, e.g.*, Conn. Gen. Stat. § 53a-90a(a) (state law criminalizing sexual solicitation of individual less than 16 years old); Wis. Stat. § 948.075 (same), *with* 18 U.S.C. § 2422(b) (federal law criminalizing sexual solicitation of individual less than 18 years old). And in addition to medical marijuana laws, some state laws decriminalize the possession of controlled substances under other narrowly defined circumstances. *See, e.g.*, N.M. Stat. Ann. § 30-31-27.1 (exempting from state criminal prosecution the possession of a controlled substance by an individual who needs medical assistance due to a drug overdose or who seeks medical assistance for a person experiencing an overdose).

that happens not to be forbidden under state law." *Gonzales*, 546 U.S. at 290 (Scalia, J., dissenting).

Finally, the decision below is consistent with this Court's recent preemption cases addressing the relationship between federal regulatory regimes and state tort law, *see Wyeth v. Levine*, 129 S. Ct. 1187 (2009); *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000). Because these cases deal with the careful policy balances embodied by complex federal regulatory structures and state tort law standards of negligence, rather than the straightforward decisions about what conduct each sovereign chooses to criminalize, it is questionable whether the tort cases apply here at all. To the extent they do, this Court's analysis in *Wyeth* demonstrates that there is no positive conflict if, as here, the Counties can satisfy their state-law obligations without violating federal law. *See Wyeth*, 129 S. Ct. at 1196-99 (no preemption where drug company could satisfy more demanding state tort law standard for prescription drug warning label without violating federal labeling requirements). As for obstacle preemption, *Wyeth* also reaffirmed that, "'[t]he case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.'" *Id.* at 1200 (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989)). This Court in *Wyeth* found significant the "longstanding coexistence of state and federal law" in the field of

prescription drug labeling, *id.* at 1203; similarly, here, as discussed, Congress has eschewed a one-size-fits-all approach in favor of a federalist scheme that leaves states free to enact their own penal laws for controlled substances—an area of traditional state concern. *See* 21 U.S.C. § 903; *Gonzales*, 546 U.S. at 251 (noting that the CSA "explicitly contemplates a role for the States in regulating controlled substances"). That California has taken Congress up on its invitation is consistent with congressional intent, and the Court of Appeal was correct in so holding.

In sum, the Counties cannot be correct that any state penal drug regime that does not criminalize the entire range of conduct prohibited by the CSA must be preempted. The Counties' position ignores the clearly expressed intent of Congress and contravenes a basic tenet of State sovereignty. If accepted, the Counties' argument would result in the preemption of countless state statutes and effectively federalize state criminal law, at least whenever the congressional judgment about what conduct should be subject to criminal penalties is stricter than that of a state. Accordingly, the California Court of Appeal was correct to find no preemption here. The CSA plainly permits the States to enact penal drug laws that do not criminalize the same exact conduct as federal law, and as a corollary, to adopt measures designed to assist local law enforcement by identifying persons not subject to arrest or prosecution under state law.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Dated April 15, 2009

Supreme Court, U.S.
FILED
APR 15 2009
OFFICE OF THE CLERK

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Nos. 08-887 and 08-891

# In the Supreme Court of the United States

COUNTY OF SAN DIEGO, ET AL., *Petitioners,*

v.

SAN DIEGO NORML, ET AL., *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

## BRIEF FOR THE STATE OF CALIFORNIA AND SANDRA SHEWRY IN OPPOSITION

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## QUESTION PRESENTED

Whether the federal Controlled Substances Act preempts California laws that allow medical marijuana patients and their caregivers to obtain identification cards.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Reasons why the petitions should be denied | 5 |
| I. Because the counties declined to challenge a key provision of the Compassionate Use Act, the broad preemption question posed in the petitions was not before the court below | 6 |
| II. The counties' limited standing further diminishes the utility of this case as a vehicle for review | 7 |
| III. The Court of Appeal correctly held that California's identification card laws are not preempted by the CSA | 9 |
| Conclusion | 11 |

# TABLE OF AUTHORITIES


CASES — Page

*Ashley Hospital v. Cass County, N.D.*
326 U.S. 207, 66 S. Ct. 61 (1945) ..... 7

*Buckman Co. v. Plaintiffs' Legal Committee*
531 U.S. 341, 121 S. Ct. 1012 (2001) ..... 10

*City of Garden Grove v. Superior Court (Kha)*
157 Cal. App. 4th 355 (2007) ..... 9

*Geier v. American Honda Motor Co.*
529 U.S. 861, 120 S. Ct. 1913 (2000) ..... 10

*Gonzales v. Oregon*
546 U.S. 243, 126 S. Ct. 904 (2006) ..... 2

*Gonzalez v. Raich*
545 U.S. 1, 125 S. Ct. 2195 (2005) ..... 2

*Lance v. Coffman*
549 U.S. 437, 127 S. Ct. 1194 (2007) ..... 8

*Lockyer v. City & County of San Francisco*
33 Cal. 4th 1055 (2004) ..... 8

*Lorillard Tobacco Co. v. Reilly*
533 U. S. 525, 121 S. Ct. 2404 (2001) ..... 7

*New York v. United States*
505 U.S. 144, 112 S. Ct. 2408 (1992) ..... 6

*Printz v. United States*
521 U. S. 898, 117 S. Ct. 2365 (1997) ..... 6

*Schlesinger v. Reservists Committee to Stop the War*
418 U.S. 208, 94 S. Ct. 2925 (1974) ..... 8

## TABLE OF AUTHORITIES
(continued)

Page

*Sprietsma v. Mercury Marine*
537 U.S. 51, 123 S. Ct. 518 (2002) ..... 10

*Star-Kist Foods, Inc. v. County of Los Angeles*
42 Cal. 3d 1 (1986) ..... 9

*United States v. Richardson*
418 U.S. 166, 94 S. Ct. 2940 (1974) ..... 8

STATUTES

21 U.S.C. §§ 801-971 ..... *passim*

21 U.S.C. § 844a(a) ..... 2

21 U.S.C. § 903 ..... 2, 4, 9, 10

28 U.S.C. § 1257(a) ..... 1

CALIFORNIA HEALTH & SAFETY CODE

§ 11054(d)(13) ..... 2
§ 11357 ..... 2
§ 11358 ..... 2
§ 11362.5 ..... *passim*
§ 11362.5(c) ..... 2
§ 11362.5(d) ..... *passim*
§§ 11362.7-11362.83 ..... *passim*
§§ 11362.71-11362.775 ..... 3
§ 11362.71(b) ..... 3

CONSTITUTIONAL PROVISIONS

U.S. Constitution, amend. X ..... 6

U.S. Constitution, art. III ..... 8

# In the Supreme Court of the United States

COUNTY OF SAN DIEGO, ET AL., *Petitioners,*

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

## BRIEF FOR THE STATE OF CALIFORNIA AND SANDRA SHEWRY IN OPPOSITION

## OPINIONS BELOW

The Supreme Court of California's denial of review (Pet. App. 68)[1] is unreported. The opinion of the California Court of Appeal, Fourth Appellate District (*id.* at 1-47) is reported at 165 Cal. App. 4th 798. The ruling of the Superior Court of California, County of San Diego (*id.* at 48-61) is unreported.

## JURISDICTION

The Court of Appeal's opinion was filed on July 31, 2008. The Supreme Court of California denied review on October 16, 2008. The petitions for a writ of certiorari were filed on January 12, 2009. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

[1] All record citations are to petitioner County of San Diego's Appendix, unless otherwise noted.

## STATEMENT

1. Adopted in 1970, the federal Controlled Substances Act, 21 U.S.C. §§ 801-971 ("CSA"), is a regulatory system designed to combat recreational drug abuse by prohibiting the manufacture, distribution, or possession of any controlled substance, including marijuana. *Gonzales v. Oregon*, 546 U.S. 243, 271-272, 126 S. Ct. 904 (2006); Pet. App. 37. Hence, under federal law, the possession of marijuana for personal use is a misdemeanor. 21 U.S.C. § 844a(a). However, the CSA does not exclude "any State law on the same subject matter . . . unless there is a positive conflict" between federal and state law such that "the two cannot consistently stand together." *Id.* § 903.

2. Under California law, marijuana also is classified as a controlled substance, and its possession and cultivation are generally illegal. *See* CAL. HEALTH & SAFETY CODE § 11054(d)(13); § 11357 (marijuana possession a misdemeanor); § 11358 (marijuana cultivation a felony); Pet. App. 4. But California is one of at least nine states which permit the use of marijuana for limited medical purposes. *Gonzalez v. Raich*, 545 U.S. 1, 5, 125 S. Ct. 2195 (2005); Pet. App. 9. California voters approved the Compassionate Use Act of 1996, California Health and Safety Code § 11362.5 ("CUA"), on November 5, 1996. This statute made three substantive changes to California law, including the decriminalization of marijuana possession and cultivation by the seriously ill, under state law, when a physician has recommended it for medical use. *Id.* § 11362.5(d). The CUA also protects doctors from state law sanctions when they recommend marijuana for medical purposes. *Id.* § 11362.5(c).

In 2003, the California Legislature enacted the Medical Marijuana Program Act, California Health and Safety Code §§ 11362.7-11362.83 ("MMP"), to address issues not included in the CUA. Pet. App. 6. The majority of the statutes comprising the MMP

relate to the operation of a voluntary program under which qualified patients and caregivers may apply for an identification card designed both to help state law enforcement officers identify qualified patients and caregivers, and to insulate cardholders from arrest for violations of certain state laws relating to marijuana. *See* CAL. HEALTH & SAFETY CODE §§ 11362.71-11362.775. The application for the card expressly states that the card will not shield holders from arrest or prosecution under federal law; it merely identifies people that California has exempted from state law sanctions. Pet. App. 35.

Much of the MMP confers no rights and imposes no obligations on California counties. Pet. App. 7 & n. 2. Counties are, however, required to participate in the identification card program by (a) providing applications upon request to individuals seeking to join the identification card program; (b) processing completed applications; (c) issuing identification cards to approved applicants; and (d) keeping certain records. CAL. HEALTH & SAFETY CODE § 11362.71(b).

3. In 2006, the San Diego chapter of the National Organization for the Reform of Marijuana Laws ("NORML") threatened to sue the County of San Diego over its refusal to process applications for identification cards. Rather than wait for a lawsuit, however, San Diego preemptively filed an action in state court, seeking a judicial declaration that it was not required to issue the cards because federal law preempts the MMP and portions of the CUA. Pet. App. 10. Notably, the county excluded from its complaint a contention that federal law preempts the provision in the CUA which decriminalized the possession and cultivation of marijuana – subdivision (d) of Health and Safety Code section 11362.5. *Id.* The County of San Bernardino and its sheriff filed a similar declaratory relief complaint soon after, and the cases were consolidated. Both complaints named, among other defendants, the State of California and the Director of the Department of Health Services (the "State").

After the State's demurrer on the issue of standing was overruled (Pet. App. 69-74), the parties filed cross-motions for judgment on the pleadings. The court granted the State's motion, ruling that neither the challenged portions of the CUA, nor the MMP, were preempted by federal law. *Id.* at 49-60. Accordingly, judgment was entered for the State and against the County of San Diego, the County of San Bernardino, and San Bernardino County Sheriff Gary Penrod (the "Counties") (*id.* at 61-67), who appealed to the Court of Appeal for the State of California, Fourth Appellate District, Division One.

4. The Court of Appeal affirmed. After observing that the Counties had limited their preemption challenges by declining to challenge the constitutionality of subdivision (d) of the CUA (Pet. App. 3, 10), the Court of Appeal examined whether, under settled principles of state law, the Counties had standing to raise what it called "hypothetical constitutional infirmities" in California's medical marijuana laws. *Id.* at 13. In conferring only limited standing, the court below observed that "major portions of the MMP and CUA neither impose obligations on nor inflict direct injury to Counties," and thus the court rejected "Counties' effort to obtain an advisory opinion declaring the *entirety* of the MMP and the bulk of the CUA invalid under preemption principles." *Id.* at 20 (italics in original). Hence, the Court of Appeal reached the "Counties' preemption arguments as to those statutes, and *only* those statutes, that require Counties to implement and administer the identification card program." *Id.* at 21 (italics in original).

The Court of Appeal then turned to the question of whether California's identification card program was preempted by the CSA. Following the plain text of the CSA's anti-preemption provision, 21 U.S.C. § 903, the court found that Congress intended to "preempt only those state laws that positively conflict with the CSA so that simultaneous compliance with both sets of laws is impossible." Pet. App. 34. It

went on to conclude that, because the CSA "does not compel the states to impose criminal penalties for marijuana possession, the requirement that Counties issue cards identifying those against whom California has opted not to impose criminal penalties does not positively conflict with the CSA." *Id.* at 35-36. It further observed that even if Congress had intended to preempt state laws that present an obstacle to the CSA, the identification card laws posed no obstacle because California's decision "to exempt the bearer of an identification card from arrest by state law enforcement for state law violations does not invalidate the identification laws under obstacle preemption." *Id.* at 40.

5. The Supreme Court of California summarily denied review on October 16, 2008. Pet. App. 68.

## REASONS WHY THE PETITIONS SHOULD BE DENIED

This case presents a poor vehicle for deciding whether the federal Controlled Substances Act preempts state laws that allow possession of marijuana for medical purposes. First, that issue was not before the court below because the Counties declined to challenge the statute which actually decriminalized the possession and cultivation of marijuana for medical purposes under California law. Second, because the court below properly curtailed the Counties' standing under established state law principles, it did not reach even the more limited preemption question that the Counties posed in their complaints. Instead, the Court of Appeal decided the narrow question of whether the CSA prohibits California counties from issuing identification cards to medical marijuana patients and their caregivers. On that question, the Court of Appeal applied settled law to the facts of the case, and the Counties simply dispute the result. Accordingly, this case does not warrant review.

## I. BECAUSE THE COUNTIES DECLINED TO CHALLENGE A KEY PROVISION OF THE COMPASSIONATE USE ACT, THE BROAD PREEMPTION QUESTION POSED IN THE PETITIONS WAS NOT BEFORE THE COURT BELOW.

The Counties contend that this Court's review is warranted because the case presents the "important question" of whether "state laws that authorize individuals to use marijuana for medical purposes are preempted by the CSA." San Diego Pet. 13-14; see also San Bernardino Pet. 5. In reality, this broad preemption question is not presented in this case because the Counties did not challenge subdivision (d) of Health and Safety Code section 11362.5, the provision which decriminalized the possession and cultivation of marijuana under California law when a physician recommends its use to treat a serious medical condition. Pet. App. 3, 10; San Bernardino Pet. App. 144a-145a.[2]

Because the Counties elected not to challenge subdivision (d), the question of whether the CSA preempts a state law exemption for medical marijuana was not before the court below – a point

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[2] The Counties' failure to challenge subdivision (d) of section 11362.5 is a tacit acknowledgment that California (like other states) may decriminalize marijuana for medical purposes because the Tenth Amendment to the United States Constitution precludes the federal government from compelling "States to implement, by legislation or executive action, federal regulatory programs." *Printz v. United States*, 521 U.S. 898, 925, 117 S. Ct. 2365 (1997). If states were precluded from decriminalizing marijuana for medical purposes, they would, in effect, be required to enforce federal drug policy. Such "commandeering" of the states' powers violates the Tenth Amendment because, as this Court has held, states must retain "the ultimate decision" whether to comply with a federal regulatory program. *New York v. United States*, 505 U.S. 144, 168, 112 S. Ct. 2408 (1992); Pet. App. 39.

which the Court of Appeal made explicit (Pet. App. 3, 10), and which San Diego quietly acknowledges. San Diego Pet. 26 n. 7. Hence, the question of whether California's medical marijuana laws are preempted by the CSA is, at best, a hypothetical issue, making this case a poor vehicle for review. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553, 121 S. Ct. 2404 (2001) (declining "to reach an issue that was not decided below"); *Ashurv Hospital v. Cass County, N.D.*, 326 U.S. 207, 213-214, 66 S. Ct. 61 (1945) ("This Court is without power to give advisory opinions. It will not decide constitutional issues which are hypothetical, or in advance of the necessity for deciding them, or without reference to the manner in which the statute, whose constitutional validity is drawn in question, is to be applied")

This case does not present any reason to depart from the general rule against review of undecided questions. Indeed, if the Counties had properly presented the question below, the Supreme Court of California may have agreed to review it. If the preemption question is in fact important and recurring, as petitioners suggest, the Court should wait for a case in which the parties properly litigate the question and the lower courts have construed the key provisions of the state statutes.

## II. THE COUNTIES' LIMITED STANDING FURTHER DIMINISHES THE UTILITY OF THIS CASE AS A VEHICLE FOR REVIEW.

The Court of Appeal further narrowed the Counties' constitutional challenge when, applying settled state law, it correctly held that the Counties lacked standing "to challenge those portions of the MMP and CUA that are not applicable to them and that do not injuriously affect them." Pet. App. 20. In so holding, the court rejected the "Counties' effort to obtain an advisory opinion declaring the *entirety* of the MMP and the bulk of the CUA invalid under preemption principles." *Id.* (italics in original). Hence, the court below did not reach even the diluted

preemption question alleged in the Counties' complaints. Nevertheless, the Counties urge this Court to find standing and to address the broad (and unpresented) issue of whether the CSA preempts California's medical marijuana laws.

San Diego argues that the court below erred when it gave the Counties standing to challenge only the identification card laws. San Diego Pet. 32-36. The county does not, however, address the Court of Appeal's rationale, nor any of the state court decisions upon which it relied in deciding to limit standing. Pet. App. 11-21. Instead, with minimal analysis, it claims standing under Article III of the United States Constitution. Pet. App. 32-33. But even under federal law, litigants must identify some concrete injury to establish standing. *See Lance v. Coffman*, 549 U.S. 437, 439, 127 S. Ct. 1194 (2007) ("One component of the [Article III] case-or-controversy requirement is standing, which requires a plaintiff to demonstrate the now-familiar elements of injury in fact, causation, and redressability"); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 219, 94 S. Ct. 2925 (1974) ("'Abstract injury is not enough'"); *United States v. Richardson*, 418 U.S. 166, 179-180, 94 S. Ct. 2940 (1974) ("to invoke judicial power the claimant must have . . . something more than 'generalized grievances'") (citations omitted).[3] The Counties cannot meet this burden.

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[3] San Diego also contends that *Lockyer v. City & County of San Francisco*, 33 Cal. 4th 1055 (2004) authorized it to seek declaratory relief invalidating California's medical marijuana laws. San Diego Pet. 33. To the contrary, the California Supreme Court in *Lockyer* expressly declined to address whether San Francisco could have sought declaratory relief. *Lockyer*, 33 Cal. 4th at 1099 n. 27 ("We have no occasion in this case to determine whether the city properly could maintain a declaratory judgment action in this setting").

San Bernardino similarly faults the court below for purportedly using "the standing issue to limit its analysis and avoid the substantive question of whether California's medical marijuana laws violate the Supremacy Clause" (San Bernardino Pet. 16), relying primarily on state court cases such as *Star-Kist Foods, Inc. v. County of Los Angeles*, 42 Cal. 3d 1 (1986) and *City of Garden Grove v. Superior Court (Kha)* 157 Cal. App. 4th 355 (2007) to support its argument. These cases, however, were properly distinguished by the court below on their facts. Pet. App. 18-19. There is little question that a political subdivision may, under the right circumstances, acquire standing in state court to challenge state law under the Supremacy Clause. But, as the court below recognized, the challenged statutes must impose some duty directly on the political subdivision, or cause it injury. *Id.* at 15-21.

Neither the decision below nor the record in this case present the broad preemption question identified in the Counties' petitions, and the court below, applying settled state law, correctly declined to pass on that question. Instead, the court decided a much narrower question involving the identification card laws. Accordingly, review is unwarranted.

## III. THE COURT OF APPEAL CORRECTLY HELD THAT CALIFORNIA'S IDENTIFICATION CARD LAWS ARE NOT PREEMPTED BY THE CSA.

The County of San Diego contends that the court below erred by applying the wrong preemption test, arguing that the CSA's express anti-preemption clause, 21 U.S.C. § 903, incorporates the implied doctrine of obstacle preemption. But in interpreting section 903, the Court of Appeal merely followed the plain words of the statute, which states that the CSA does not preempt "any State law on the same subject matter . . . unless there is a positive conflict" between the federal and state law such that "the two cannot consistently stand together." *Id.*

Applying the statute, the Court of Appeal correctly held that because the CSA "does not compel the states to impose criminal penalties for marijuana possession, the requirement that Counties issue cards identifying those against whom California has opted not to impose criminal penalties does not positively conflict with the CSA." *Id.* at 35-36. In reaching this conclusion, the Court of Appeal rejected the Counties' assertion that Congress's use of the term "conflict" in section 903 signified an intent to incorporate obstacle preemption, noting that the "Counties' proffered construction effectively reads the term 'positive' out of section 903." Pet. App. 32-33.[4]

The Court of Appeal also observed, in dictum, that, "even if Congress intended to preempt state laws that present a significant obstacle to the CSA" (Pet. App. 40-41), California's decision "to exempt the bearer of an identification card from arrest by state law enforcement for state law violations does not invalidate the identification laws under obstacle preemption." *Id.* at 40. Indeed, the card application warns that it does not immunize applicants against federal prosecution, and the card does not purport to do so. Pet. App. 35.

The Court of Appeal correctly interpreted and applied section 903, thus review is unwarranted.

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[4] San Diego renews its reliance upon *Sprietsma v. Mercury Marine*, 537 U.S. 51, 123 S. Ct. 518 (2002); *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 121 S. Ct. 1012 (2001); and *Geier v. American Honda Motor Co.*, 529 U.S. 861, 120 S. Ct. 1913 (2000), which it cites for the proposition that an express preemption provision does not bar the application of implied preemption doctrines. San Diego Pet. 30-31. These cases, however, were aptly distinguished by the court below on their facts. Pet. App. 32 & n. 12.

## CONCLUSION

For the foregoing reasons, the Counties' petitions for a writ of certiorari should be denied.

Dated: April 15, 2009

Respectfully submitted,

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No. 08-897 (3)
VIDE 08-887 (4)

Supreme Court, U.S.
FILED
APR 27 2009
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In The
# Supreme Court of the United States

COUNTY OF SAN BERNARDINO and GARY PENROD as Sheriff of the COUNTY OF SAN BERNARDINO,
*Petitioners*,

v.

STATE OF CALIFORNIA, SANDRA SHEWRY, in her official capacity as Director of California Department of Health Services; and DOES, 1 through 50, inclusive,
*Respondents*.

*On Petition for Writ of Certiorari to the California Court of Appeals Fourth District*

## PETITIONERS' REPLY BRIEF

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## TABLE OF CONTENTS

REPLY TO RESPONDENTS BRIEFS IN OPPOSITION ..... 1

I. DECRIMINALIZATION OF MEDICAL MARIJUANA IS NOT THE ISSUE, "LEGAL" POSSESSION IS ..... 2

II. SAN BERNARDINO HAS DEMONSTRATED CONCRETE AND PARTICULAR HARM AS A RESULT OF THE MMP ..... 4

III. CONCLUSION ..... 6

## TABLE OF AUTHORITIES

### CASES

*City of Garden Grove v. Superior Court*,
157 Cal.App.4th 355 (2007) ..... 2, 3

### STATUTES

21 U.S.C. § 801 *et seq.* ..... 1

California Health and Safety Code
section 11362.5 ..... 1
section 11362.7 ..... 1
section 11362.71 ..... 2
section 11362.765(a) ..... 2
section 11362.785 ..... 3
section 11362.795 ..... 3

## REPLY TO RESPONDENTS BRIEFS IN OPPOSITION

Respondents State of California ("California") and the Director of its Department of Health Services, Sandra Shewry ("Shewry"), San Diego NORML ("NORML"), a non-governmental entity, and intervenors Wendy Christakes, Norbert Litzinger, William Britt, Yvonne Westbrook, Stephen O'Brien, Wo/Men's Alliance for Medical Marijuana, and Americans for Safe Access, a non-governmental entity (collectively referred to as "Intervenors") have opposed the petitions of San Bernardino and San Diego Counties (collectively referred to as the "Counties") on essentially two grounds: 1) that the Counties failed to attack the key issue in this dispute, the decriminalization of medical marijuana; and 2) the Counties lack of standing to challenge the constitutionality of California's medical marijuana laws as they suffered no direct harm under the Compassionate Use Act ("CUA"), California Health and Safety Code section 11362.5, or the Medical Marijuana Program ("MMP"), Cal. Health & Saf. Code, § 11362.7.

For example, Intervenors argue that the Counties have mischaracterized the issue as being one of federal preemption of the state's medical marijuana laws, when in fact the question is much narrower: whether the state's user identification card system is preempted. (Intervenors' Opposition, p. 7.) This claim, however, disregards the direct adverse impact on the Counties' law enforcement agencies when faced with contradictory requirements of California's medical marijuana laws and the federal Controlled Substances Act ("CSA"), 21 U.S.C. § 801, et seq., or

when California courts order the return of federal contraband to medical marijuana users as in *City of Garden Grove v. Superior Court*, 157 Cal.App.4th 355 (2007); see also App. 196a-201a).

## I. DECRIMINALIZATION OF MEDICAL MARIJUANA IS NOT THE ISSUE, "LEGAL" POSSESSION IS.

Both the State and Intervenors have repeatedly referred to the Counties' purported failure to directly challenge the State's decriminalization of medical marijuana. Respondents miss the point. It is not the decriminalization of medical marijuana which the Counties object to, but rather the consequent possession of a substance banned under the CSA which the State permits, if not encourages. The Respondents continued references to the issue of decriminalization thus diverts attention from the true conflict between state and federal law.

As the Counties have repeatedly stated, the State is within its powers to decriminalize possession or cultivation of marijuana for medical purposes. Had the State simply stopped at decriminalization of medical marijuana there would be no present dispute. However, the enactment of the MMP goes beyond simple decriminalization to permit possession of a substance banned for all purposes under CSA. Under the MMP, the system established by the State allows qualified individuals to be given an identification card which exempts the cardholder from arrest and prosecution for the cultivation or possession of limited amounts of marijuana. (Cal. Health & Saf. Code, §§ 11362.71(e); 11362.765(a).) While the MMP does not require the accommodation of medical marijuana

at any place of employment or within penal institutions (Cal. Health & Saf. Code, § 11362.785, subd. (a)), it nevertheless allows that under certain circumstances authorized card holders incarcerated in a county jail may be permitted access to and use of medical marijuana. (Cal. Health & Saf. Code, § 11362.785, subds. (b) and (c).) Application of the Act also extends to parolees. (Cal. Health & Saf. Code, § 11362.795.) Thus, under the MMP, the incongruous situation exists that possession of federal contraband may be permitted in California penal institutions!

As related in Section II, below, the permissiveness of the State in permitting possession of medical marijuana, has a direct and adverse impact on the ability of the Counties' law enforcement personnel to carry out their jobs, and forces them into a position of having to chose between enforcement of State or federal law.

Simple decriminalization would likewise not result in the State's courts ordering the Counties to return federal contraband, i.e., medical marijuana, to its owners were it not for the extensive provisions of the MMP attempting to implement the decriminalization. Thus, such cases as *City of Garden Grove v. Superior Court*, 157 Cal.App.4th 355 (2007), and the instances cited in San Bernardino County's pleadings earlier in this case in opposition to the State's demurrer (App. 196a-198a), would not have occurred absent the MMP's condoning of the possession of medical marijuana.

Respondents' continued claims that the Counties have not addressed the central issue are inaccurate, and serve only to divert attention from the fact that it

is not the decriminalization of medical marijuana which the Counties find objectionable, but the legislative enactments of the MMP which seek to implement that decriminalization, and which result in the defiance of federal law.

## II. SAN BERNARDINO HAS DEMONSTRATED CONCRETE AND PARTICULAR HARM AS A RESULT OF THE MMP.

Since the outset of this dispute, and as noted in opposition pleadings of Petitioner County of San Bernardino ("San Bernardino") to the State's demurrer, its Sheriff's deputies serving on federal narcotics task forces (App. 194a, 195a, 202a-204a) are confronted by an irreconcilable conflict between state and federal law whenever marijuana seized is claimed to be for medical purposes.

In determining whether the present dispute is sufficiently concrete to make declaratory relief appropriate and satisfy the standing requirements, San Bernardino contends that the parameters of the dispute are defined and are known. As maintained throughout this action, a number of areas exist in which the conflict between state and federal marijuana laws impact San Bernardino and its Sheriff's Department. Probably the most significant of these conflicts concerns enforcement.

Notwithstanding the State's argument that county law enforcement officers may have discretionary authority concerning the enforcement of federal law, Respondents ignore the true dilemma which Sheriff's deputies of San Bernardino and other counties face. The dilemma stems from the prohibited nature of

marijuana. As long as marijuana is federal contraband, Sheriff's deputies are unquestionably violating federal law in returning seized marijuana to persons, regardless of whether the marijuana is intended for medical purposes, and even if acting under court order.

Furthermore, the claim that county Sheriff's deputies are not responsible for the enforcement of federal law overlooks the fact that narcotics detectives assigned to the Sheriff's Department's narcotics division of San Bernardino regularly work side by side with federal law enforcement officers as part of the following organizations: the Marijuana Eradication Team, the Methamphetamine Enforcement Team, the Campaign Against Marijuana Planting ("C.A.M.P.") Task Force (C.A.M.P. is a multi-agency task force managed by the State's Bureau of Narcotics Enforcement), the federal Drug Enforcement Administration's ("DEA") Street Narcotics Enforcement Team, the federal High Intensity Drug Trafficking Area ("HIDTA") Task Force (on which San Bernardino Sheriff's deputies serve alongside State Highway Patrol Officers), the Inland Regional Narcotics Enforcement Team ("IRNET"), the Highway Interdiction Enforcement Team (composed of DEA, State, San Bernardino, and city law enforcement officers), and the Ontario International Airport Task Force (composed of DEA, City of Ontario Police Department, and San Bernardino Sheriff's personnel) all of which enforce *both* state and federal marijuana laws. Further, some San Bernardino Sheriff's deputies are cross-deputized as federal DEA agents. (App. 202a-204a.)

In addition to the complications for local law enforcement, the conflict between the state and federal medical marijuana laws have resulted in the filing of motions and government tort claims against San Bernardino Sheriff's Department to return seized marijuana. Thus far, these motions have only failed because: 1) the deteriorated condition of the plants at the time that the motions were heard made it impossible to return the seized material, and/or 2) the existence of other operative facts indicated the confiscated marijuana was being used for other non-medical purposes. Furthermore, San Bernardino has had at least two cases in which the disposition of growing equipment which was seized with allegedly medical marijuana is in question. (See App. 196a-198a.)

Finally, as a result of marijuana seizures by its Sheriff's deputies, San Bernardino has faced an on-going series of tort claims and potential civil liability from individuals claiming to be authorized medical marijuana users or caregivers. (App. 199a-201a.)

As evidenced above, Respondents' claims that the Counties face no direct harm or impact as a result of California's medical marijuana laws disregards the adverse consequences which have been addressed since the outset of this case.

## III. CONCLUSION

No matter how innocuous the Respondents may characterize the State's decriminalization of medical marijuana, possession of that substance remains illegal under federal law. While Respondents attempt to argue around that point by challenging the

Counties' standing, and claiming that State and federal law are indeed compatible, the truth is that any state law which allows possession of an illegal substance under federal law is in direct conflict with that law. So long as California's medical marijuana laws seek to facilitate medical usage of federal contraband, those laws conflict with the CSA, and so long as law enforcement is faced with indecision whenever marijuana is seized, required to return seized federal contraband to its owners, and faced with civil tort liability for attempting to comply with federal law, the requisite standing is present.

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Dated: April 27, 2009

124

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FILED

APR 2 7 2009

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SUPREME COURT, U.S.

No. 08-887

In The

# Supreme Court of the United States

COUNTY OF SAN DIEGO, et al.,

*Petitioners,*

vs.

SAN DIEGO NORML, et al.,

*Respondents.*

**On Petition For Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District, Division One**

## REPLY BRIEF OF PETITIONER COUNTY OF SAN DIEGO

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TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| REPLY BRIEF OF PETITIONER COUNTY OF SAN DIEGO | 1 |
| I. THIS CASE RAISES IMPORTANT QUESTIONS THAT THE COURT SHOULD RESOLVE | 4 |
| II. THE COUNTY HAS STANDING | 7 |
| III. THE CSA'S EXPRESS PREEMPTION CLAUSE DOES NOT SAVE THE MEDICAL MARIJUANA LAW | 9 |
| IV. THERE IS NO TENTH AMENDMENT ISSUE | 13 |
| V. CONCLUSION | 15 |

# TABLE OF AUTHORITIES

Page

CASES

*Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) ..... 9, 10

*Gade v. National Solid Wastes Management Association*, 505 U.S. 88 (1992) ..... 10

*Gonzales v. Oregon*, 546 U.S. 243 (2006) ..... 9

*Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264 (1981) ..... 14

*Levine v. Wyeth*, 944 A.2d 179 (Vt. 2006) ..... 11

*Southern Blasting Services, Inc. v. Wilkes County*, 288 F.3d 584 (4th Cir. 2002) ..... 12

*Wyeth v. Levine*, 129 S. Ct. 1187 (2009) ..... 11, 12

STATUTES AND U.S. CONSTITUTION

21 United States Code

section 903 ..... 9

California Health & Safety Code

sections 11362.5(a)-(c) and (e) ..... 6

section 11362.5(d) ..... 5, 6, 8, 9

sections 11362.7 through 11362.83 ..... 6

U.S. Constitution, Article III ..... 7

U.S. Constitution, Amendment X ..... 13, 14

## REPLY BRIEF OF PETITIONER COUNTY OF SAN DIEGO

Respondents do not dispute the critical points raised in the County of San Diego's (the "County") Petition. The following points remain unrebutted:

- Congress' goal in enacting the Controlled Substances Act ("CSA") was to eradicate the use of certain drugs, including marijuana;
- In the CSA, Congress declared that marijuana has no medically accepted use;
- Under the CSA, Congress created a "closed system" in order to prevent drugs from being diverted from legitimate medical users into the hands of recreational drug users;
- California's Medical Marijuana Law authorizes individuals to engage in conduct – the use[1] of marijuana – that violates the CSA;
- The Medical Marijuana Law requires the County to issue identification cards that facilitate the use of marijuana – conduct that violates the CSA;

---

[1] Unless otherwise indicated, references to the "use" of marijuana should also be read to include the possession, cultivation, and transportation of marijuana.

- Since California has authorized individuals to use marijuana for medical purposes, more people will use marijuana in violation of federal law; and
- It is inevitable that marijuana grown for "medical" use will fall into the hands of recreational drugs users.

Given these undisputed facts, the Court should grant this Petition to decide whether California can (1) authorize individuals to engage in conduct that violates the CSA, and (2) require the County to issue identification cards that facilitate such conduct.

Rather than dispute the critical facts, Respondents' briefs[2] primarily attempt to downplay the importance of the issues raised in this Petition and to distort the County's position. Respondents' efforts fail.

Respondents argue that this case is not important enough for this Court to review because the County does not challenge the narrow provision of the Medical Marijuana Law where California declined to criminalize medical marijuana use. However, the County does challenge all of the remaining provisions of the Law that specifically

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[2] Respondents have filed two briefs. One brief has been filed by the State of California and the Director of the Department of Health Services (collectively the "State"). The other brief has been filed by San Diego NORML and various parties who were allowed to intervene into the action (collectively "NORML").

authorize individuals to use marijuana and require counties to issue identification cards to facilitate the marijuana use that California authorized. Whether a state can authorize individuals to engage in conduct that violates federal law is an important issue that warrants this Court's review.

Respondents also argue that the County does not have standing. NORML asserts – contrary to the Court of Appeal's determination – that the County does not have standing to challenge the identification card requirement. NORML's assertion is baseless. According to NORML, since the County is authorized to collect fees from applicants to cover the administrative costs of issuing the identification cards, the County will not be harmed by being forced to issue cards under a state law that is preempted by the CSA. A public entity that is required by a state law to engage in an illegal act (issuing identification cards under a preempted law) suffers a cognizable injury addressable by the courts even if the public entity does not have to spend the taxpayers' money in order to comply with the state law. Being forced to engage in an illegal act is sufficient harm by itself to confer standing.

Since the County had standing to challenge the identification card requirement, the Court of Appeal erred when it failed to consider the primary reason why the County cannot be required to issue the identification cards – because California cannot authorize individuals to engage in conduct – using

marijuana – that violates federal law. Respondents' briefs do not address this argument.

As expected, NORML argues that under the CSA's express preemption clause, a state law is preempted only when it is impossible to comply with both the CSA and the state law. The cases cited by NORML, however, do not support this proposition and its interpretation of the preemption clause would lead to absurd results.

In addition to being expressly preempted, the Medical Marijuana Law is preempted because it conflicts with the CSA. NORML argues that no conflict exists because the federal government can still enforce the CSA against California medical marijuana users. NORML does not dispute, however, that the purpose of the CSA is to eradicate marijuana use, not to prosecute violators. It is apparent that the Medical Marijuana Law will lead to additional marijuana use and for this reason alone it is an obstacle to Congress' true purpose of eradicating such use.

## I.

## THIS CASE RAISES IMPORTANT QUESTIONS THAT THE COURT SHOULD RESOLVE

In the Petition, the County noted that California has gone well beyond decriminalizing the use of marijuana for "medical" purposes. The Medical Marijuana Law specifically ***authorizes*** individuals

to use marijuana and requires counties to issue identification cards to ***facilitate*** the marijuana use that California has authorized. In their opposition briefs, Respondents do not dispute the broad reach of California's law. Instead, Respondents assert that the Petition should be denied because the County did not challenge a narrow provision of the Medical Marijuana Law that decriminalizes the use of marijuana for medical purposes under California law. Cal. Health & Safety Code § 11362.5(d).[3] Respondents' position is without merit.

Respondents argue that section 11362.5(d) is the "key" provision of the Medical Marijuana Law. However, the remaining provisions of the Medical Marijuana Law – provisions that authorize individuals to use, possess and cultivate marijuana for medical purposes and require counties to issue identification cards facilitating the violation of federal law – are no less "key" than section 11362.5(d). It is undisputed that the County has asserted from the very beginning that all of those provisions are

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[3] Respondents' position is ironic because they argue that the County would not have standing to challenge section 11362.5(d). Indeed, Respondents suggest that no one would have standing to challenge this provision. (NORML Brief, at 9.) Nonetheless, Respondents assert that "the Court should wait for a case in which the parties properly litigate the question and the lower courts have construed the key provisions of the state statutes." (State Brief, at 7.) If Respondents' position were accepted, however, no party would ever have standing to challenge section 11362.5(d) and no lower court would ever decide on the merits whether that section was preempted.

preempted by the CSA.[4] Indeed, even if states have the authority to decide what conduct to criminalize, they do not have the authority to authorize individuals to engage in conduct that violates federal law. The Court should grant this Petition to make it clear that states may not authorize individuals to engage in conduct that violates federal law and may not facilitate illegal conduct. This is an important issue that warrants this Court's attention.

Respondents also erroneously assert that the County is asking the Court to consider the validity of section 11362.5(d). According to the State, "[t]his case does not present any reason to depart from the general rule against review of undecided questions." (State Brief, at 7; *see also* NORML Brief, at 5.) However, the County is not asking the Court to consider whether section 11362.5(d) is preempted. The County is asking the Court to consider whether the remaining provisions of the Medical Marijuana Law that specifically authorize individuals to use marijuana and require counties to issue identification cards to facilitate marijuana use are preempted. This is an important question that should be decided by this Court.

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[4] The County alleged in its complaint and throughout this litigation that California Health and Safety Code sections 11362.5(a)-(c) and (e), and sections 11362.7 through 11362.83, are preempted by the CSA.

## II.

## THE COUNTY HAS STANDING

The Court of Appeal held that the County has standing to challenge the provisions of the Medical Marijuana Law requiring it to issue identification cards to medical marijuana users and caregivers. NORML argues that because the County is authorized by the Medical Marijuana Law to collect fees from applicants to cover the administrative costs of issuing the identification cards, "this Court must look to a difficult issue of unresolved state law" to determine whether the County has standing to challenge the identification card requirement. (NORML Brief, at 11.) NORML argues that the California Supreme Court may hold that the County is not harmed by issuing the identification cards because it can collect fees from applicants. (*Id.*) NORML's argument is meritless for several reasons. First, the issue is not "unresolved" – the Court of Appeal held that the County had standing to challenge the identification card requirement. Second, whether the County has suffered a sufficient injury to confer standing under Article III is a question of federal law, not state law. Third, it cannot seriously be argued that the County will not be harmed if it is required to issue identification cards under a state law that is preempted by federal law. The County could be found liable for issuing identification cards that violate federal law. Moreover, requiring an entity to provide a service (even if that service is paid for by a third party) that

is illegal is alone a sufficient injury to confer standing.

Since the County has standing to challenge the identification card requirement, the Court of Appeal erred when it failed to consider the County's argument why it cannot be required to issue the identification cards – because California cannot authorize individuals to use marijuana for medical purposes. The County made this point in its Petition. Respondents do not even address this point in their briefs.

Indeed, the State does not contend that if the provisions of the Medical Marijuana Law authorizing individuals to use marijuana for medical purposes were declared preempted that California could require the County to issue identification cards to medical marijuana users and caregivers. This is a tacit admission that the County has standing to challenge the provisions of California law authorizing individuals to use marijuana for medical purposes because, if those provisions are preempted, the identification card provisions are necessarily invalid.

As part of its standing argument, NORML resorts to the tactic discussed above – confusing the narrow provision decriminalizing marijuana use (section 11362.5(d)) with the remaining provisions of the Medical Marijuana Law authorizing individuals to use marijuana and requiring counties to issue identification cards to facilitate the marijuana use that California has authorized. NORML argues that

the County would not have standing to challenge section 11362.5(d),[5] but does not explain why the County does not have standing to challenge the remaining provisions of the Medical Marijuana Law that specifically authorize individuals to use marijuana – conduct that violates federal law.

## III.

## THE CSA'S EXPRESS PREEMPTION CLAUSE DOES NOT SAVE THE MEDICAL MARIJUANA LAW

Respondents' assertion that the CSA's express preemption clause (21 U.S.C. § 903)[6] supports their position that the Medical Marijuana Law is not preempted is without merit. Section 903 preempts state laws when there is a "positive conflict" between the CSA and the state law "so that the two cannot consistently stand together." 21 U.S.C. § 903. NORML asserts that a "positive conflict" only occurs when it is physically impossible to comply with both the CSA and the state law. NORML contends that the Court reached this conclusion in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143

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[5] The County's standing to challenge section 11362.5(d) is not an issue because the County does not argue that this provision is preempted.

[6] Respondents refer to section 903 as an "anti-preemption" clause. This Court, however, has referred to section 903 as a "pre-emption provision." *Gonzales v. Oregon*, 546 U.S. 243, 251 (2006).

(1963) and *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992). NORML is simply wrong.

The *Paul* case did not involve interpretation of an express preemption clause, much less an express preemption clause that contained the phrase "positive conflict." The *Gade* case also did not involve the interpretation of an express preemption clause or "positive conflict" language. Indeed, the Court found that the state law at issue in that case was preempted.

NORML asserts that under the CSA, "Congress intended to preempt only state laws in positive conflict with the CSA, and no others." (NORML Brief, at 17.) The County agrees that Congress intended to preempt state laws that are in positive conflict with the CSA. Respondents offer no persuasive reason, however, why a state law that authorizes individuals to engage in conduct that the CSA prohibits does not create a positive conflict with the CSA. Neither do Respondents explain why a state law that is an obstacle to the accomplishment of the purposes and objectives of the CSA does not create a "positive conflict" with the CSA.

Indeed, Respondents' contention that the CSA's express preemption clause precludes a court from considering whether a state law is an obstacle to the accomplishment of the purposes and objectives of the CSA is meritless. In order to accept this position, the Court would have to conclude that Congress intended

to allow states to pass laws that conflict with the CSA. Respondents offer no reason why Congress would have wanted this absurd result.

NORML also argues that the Medical Marijuana Law is not an obstacle to the accomplishment of the purposes and objectives of the CSA because the federal government can still enforce the CSA. However, as discussed in detail in the Petition, the purpose of the CSA is to prevent the use of illegal drugs such as marijuana – not to prosecute individuals for violating the CSA. Respondents do not even try to refute the County's position that under the Medical Marijuana Law (1) marijuana use will increase and (2) marijuana grown for medical purposes will be diverted to recreational drug users. These undisputed facts establish that the Medical Marijuana Law is an obstacle to the accomplishment of the real purposes and objectives of the CSA and is therefore preempted.

NORML's assertion that the Court of Appeal's decision is consistent with this Court's recent decision in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009) is mistaken. In finding that the state tort law at issue in *Wyeth* was not preempted, the Vermont Supreme Court decided that the federal Food, Drug and Cosmetic Act's savings clause precluded it from considering whether Vermont's law was an obstacle to the accomplishment of the purposes and objectives of the federal law. *Levine v. Wyeth*, 944 A.2d 179, 190-191

(Vt. 2006). Relying on *Southern Blasting Services, Inc. v. Wilkes County*, 288 F.3d 584 (4th Cir. 2002)[7] the Vermont court concluded that the savings clause, which requires a "direct and positive conflict" for preemption, expressed Congress' intent to only preempt laws when it is impossible to comply with both the state and federal law. *Id.* This Court rejected that argument, specifically considering whether the Vermont law was an obstacle to the accomplishment of the purposes and objectives of the federal law. *Wyeth*, 129 S. Ct. at 1199-1204.

Further, Vermont's tort laws regulated prescription drug warning labels more stringently than did the federal law. Therefore, Vermont's laws were consistent with the purpose of the federal law "to bolster consumer protection against harmful products." *Id.* at 1199 (citations omitted). Here, however, California has authorized individuals to use marijuana. This is inconsistent with Congress' goal of eradicating marijuana use.

For these reasons, the Medical Marijuana Law is expressly preempted because it "positively conflicts" with the CSA and is impliedly preempted because it is an obstacle to the accomplishment of the purposes and objectives of the CSA.

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[7] The Court of Appeal relied on *Southern Blasting* for the same proposition and NORML cites this case in its brief for this proposition.

## IV.

## THERE IS NO TENTH AMENDMENT ISSUE

Respondents argue that an order declaring the Medical Marijuana Law preempted would violate the Tenth Amendment. Respondents' argument is based on a mischaracterization of the County's position and a misreading of this Court's Tenth Amendment jurisprudence.

Respondents incorrectly assert that if the Medical Marijuana Law were found preempted, it "would force States to enact criminal prohibitions that mirror those of federal law." (NORML Brief, at 19-20.) Respondents are incorrect. If this Court were to find the Medical Marijuana Law preempted, California would not be "forced" to enact any law. An easy example demonstrates this point. If Congress passed a law requiring oranges to be transported in red trucks and California passed a law requiring oranges to be transported in blue trucks, the California law would be preempted because it conflicts with the federal law. An order declaring the California blue truck law preempted ***would not require the Legislature to pass a law providing, as does the federal law, that oranges must be transported in red trucks***. California would be free to pass no legislation at all dealing with this area, but it could not pass a law that conflicts with the federal law. The same is true for California's Medical Marijuana Law. An order finding the Medical Marijuana Law preempted would not require California to pass a

law declaring the medicinal use of marijuana illegal. The Legislature can choose not to enact any law dealing with the medicinal use of marijuana, but cannot enact a law that authorizes individuals to use marijuana for medical purposes in conflict with the CSA.

Moreover, this Court has held that the Tenth Amendment does not limit congressional power to preempt state laws that regulate private conduct affecting interstate commerce. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289-290 (1981) ("To object to this scheme, however, ***appellees must assume that the Tenth Amendment limits congressional power to pre-empt or displace state regulation of private activities affecting interstate commerce. This assumption is incorrect.***") (emphasis added).

Accordingly, an order finding the Medical Marijuana Law preempted would not violate the Tenth Amendment.

## V.

## CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

DATED: April 27, 2009

Respectfully submitted,

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125

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filed
Feb. 13, 2009

No. 08-887

In The
# Supreme Court of the United States

COUNTY OF SAN DIEGO, et al.,

*Petitioners,*

vs.

SAN DIEGO NORML, et al.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District, Division One**

## BRIEF OF THE DRUG FREE AMERICA FOUNDATION, INC., THE DRUG FREE SCHOOLS COALITION, SAVE OUR SOCIETY FROM DRUGS, THE INTERNATIONAL SCIENTIFIC AND MEDICAL FORUM ON DRUG ABUSE, THE INSTITUTE ON GLOBAL DRUG POLICY, STUDENTS TAKING ACTION NOT DRUGS, SAFE APPROVED MEDICINE FOR NEW JERSEY AND VARIOUS CALIFORNIA ORGANIZATIONS AND CITIZENS, ET AL., AS AMICI CURIAE IN SUPPORT OF PETITIONER

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## QUESTIONS PRESENTED

Whether California's Medical Marijuana Law, which authorizes individuals to use, possess and cultivate marijuana for medical purposes, is pre-empted under the Supremacy Clause by the federal Controlled Substances Act, which prohibits the same conduct?

Whether the Controlled Substances Act's express preemption clause precludes a court from considering whether California's Medical Marijuana Law is an obstacle to the accomplishment of the purposes and objectives of the federal law in deciding whether the California law is preempted?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

INTEREST OF AMICI ..... 1

SUMMARY OF ARGUMENT ..... 2

ARGUMENT ..... 3

# TABLE OF AUTHORITIES

Page

CASES

*Alliance for Cannabis Therapeutics v. DEA and NORML v. DEA*, 15 F.3d 1131 (D.C. Cir 1994) ..... 4, 7

*Gonzales v. Raich*, 545 U.S. 1 (2005) ..... 4

FEDERAL STATUTES

21 U.S.C. §§ 351-360 ..... 3

21 U.S.C. § 812(b)(f) ..... 4, 17

STATE STATUTES

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Page

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## INTEREST OF AMICI

Amici Curiae are parents who have lost children to drugs, and drug-prevention organizations, distinguished medical and scientific experts, policy makers, business owners and others who are concerned with preventing drug abuse.[1] They share a common concern that smoked or crude marijuana is disingenuously referred to as medicine.[2] Smoked or "crude" marijuana is a dangerous Schedule I drug, notwithstanding creative attempts by those who seek its legalization to label its use as "compassionate" in medical settings. "Medical" marijuana initiatives now enacted in several states undermine our national drug-enforcement priorities as provided in the Controlled Substances Act and our well-designed federal

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amici Curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] Throughout this brief we use the term "crude marijuana" to describe the illicit Schedule I drug that people abuse. The drug is derived from the leaves and flowering tops of the Cannabis plant and is consumed in a variety of ways. The dried plant material is most often rolled in paper and smoked as a cigarette, called a "joint." It is often placed in smoking devices called "bongs," smoked in pipes, or smoked in "blunts," which are cigars from which the tobacco has been removed and replaced with marijuana plant material. Sometimes it is baked in cookies or brownies and eaten, or brewed in tea and drunk. Other methods for consuming the drug are constantly being developed by the drug culture, including versions that allegedly aerosolize crude marijuana to remove its "tars."

system of approval of new drugs. We must preserve the Food and Drug Administration's medical and scientific drug approval process that protects Americans from unsafe, ineffective drugs. This brief is submitted to present to the Court current research which confirms that the drug marijuana continues to have no currently accepted medical use and that the California "medical" marijuana law is an obstacle to the accomplishment of the purposes and objectives of the federal law.

The complete list of amici is in Appendix I

This brief is in memory of the following dear children lost to drugs.

Dave and Casey Pease

Steven Steiner, Jr., age 19

Garrett Douglas Hughes, age 22

David Farmer, age 28

Karen Lynn Berry, age 17

Daniel R. Silverman, age 19

## SUMMARY OF ARGUMENT

There is still no proven medical value in the use of crude marijuana. This remains the unequivocal position of the Food and Drug Administration, which is charged by Congress with making this determination. Absent a legitimate and currently accepted

medical use for crude marijuana, the lower court's reasoning must fail, as it would therefore have no basis for establishing this separate class of drug use which is independent of the Controlled Substances Act. As demonstrated herein, both federal law and the weight of medical research continue to find crude marijuana use to be dangerous and without legitimate medical application. In addition, the California medical marijuana law has led to widespread abuses.

## ARGUMENT I

### BECAUSE CRUDE MARIJUANA HAS NO CURRENTLY ACCEPTED MEDICAL USE, ITS PURPORTED MEDICAL USE CANNOT CONSTITUTE A CLASS OF ACTIVITIES SEPARATE FROM THE ACTIVITIES REGULATED BY THE CONTROLLED SUBSTANCES ACT ("CSA"), AND THE CSA, PURSUANT TO THE COMMERCE CLAUSE POWERS, HAS JURISDICTION OVER ANY AND ALL MARIJUANA USE

There is a strong governmental interest in prohibiting the distribution of crude marijuana as medicine. The federal government has expressly taken on the job of protecting our citizens from unsafe, ineffective substances sold as "medicines," and from drug abuse, drug addiction, and the abusive and criminal behaviors that marijuana and other illicit drugs often generate. Before any drug can be classified as "medicine," the drug must first be approved by the Food and Drug Administration (the "FDA"). The federal Food, Drug, and Cosmetics Act, 21 U.S.C. §§ 351-360,

gives the federal government, through the FDA, sole responsibility for determining that drugs are safe and effective, a requirement all medicines must meet before they may be distributed to the public. The FDA has not approved crude marijuana as safe or effective, so the drug may not legally be prescribed and sold as a medicine.

Not only has the FDA failed to approve marijuana, but Congress has classified marijuana as a Schedule I controlled substance under the Controlled Substances Act. Schedule I drugs have "(1) a high potential for abuse, (2) no currently accepted treatment in the United States, and (3) a lack of accepted safety for use of the drug . . . under medical supervision." 21 U.S.C. § 812(b)(f). The classification of marijuana as a Schedule I drug has been repeatedly challenged and the challenges repeatedly rejected. *Gonzales v. Raich*, 545 U.S. 1, 15 n.23 (2005). Indeed, according to federal law, "medical marijuana" is a non sequitur. It cannot be reanimated, phoenix-like, at the state level, simply to create an otherwise unavailable refuge from the scope of the CSA.

In *Alliance for Cannabis Therapeutics v. DEA and NORML v. DEA,* 15 F.3d 1131 (D.C. Cir 1994), the United States District Court for the District of Columbia accepted the Drug Enforcement Administration's new five-part test for determining whether a drug is in "currently accepted medical use." Id. at 1135. The test requires that:

(1) The drug's chemistry must be known and reproducible;

(2) there must be adequate safety studies;

(3) there must be adequate and well-controlled studies proving efficacy;

(4) the drug must be accepted by qualified experts; and

(5) the scientific evidence must be widely available.

Applying these criteria to a petition to reschedule crude marijuana, the court found that the drug had no currently accepted medical use and, therefore, must remain a Schedule I substance. It should be noted that although the FDA has not approved crude marijuana as safe and effective, the FDA has approved medications to treat all of the diseases, symptoms, and ailments identified in California's medical marijuana law, and therefore, safe and effective legal alternatives to crude marijuana exist.

All medications, particularly those containing controlled substances, should become available only after having satisfied the rigorous criteria of the federal Food and Drug Administration (FDA) approval process. That process has been carefully constructed over the past century to protect patient health and safety. Patients and physicians have the right to insist that prescription medications have satisfied modern medical standards for quality, safety and efficacy. Such medications must be standardized by composition and dose and administered in an appropriate delivery system with a reproducible dose. Furthermore, preclinical and clinical studies are

necessary to provide physicians with adequate information to guide their prescribing decisions.

The anecdotal reports of benefits of "medical" marijuana cannot be regarded as scientific evidence because the claimed benefits were not independently verified and quantified. The anecdotal reports do not reflect double-blind controls and hence are not free of potential confounders such as expectancy, placebo effect, and deliberate exaggeration for ideological reasons.[3]

There is no reason why medications derived from the cannabis plant should be exempted from the FDA process. Proliferation of "medical marijuana" state laws creates an unregulated system that allows untested and potentially contaminated materials to be distributed to vulnerable patients.

"Medical" marijuana is not dispensed in medically controlled environments nor are the "patients" required to be monitored by physicians after they obtain the recommendation. In many cases the "patients" are not even examined by physicians. Such a system benefits marijuana growers and vendors, but endangers the well-being of patients and undermines the integrity of the physician-patient relationship.

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[3] "Smoked Marijuana as Medicine: Not Much Future," Clinical Pharmacology & Therapeutics (2008), H Kalant, Department of Pharmacology, University of Toronto, Toronto, Ontario, Canada

Many prominent national health organizations do not support crude smoked marijuana for medicinal use. Crude marijuana as medicine has been rejected by the American Medical Association, the National Multiple Sclerosis Society, the American Glaucoma Society, the American Academy of Ophthalmology, the American Cancer Society, the National Eye Institute, the National Institute for Neurological Disorders and Stroke and the federal Food and Drug Administration.[4]

Some medical organizations, such as the American College of Physicians, support research into cannabinoids. This has been used by marijuana legalization advocates as proof that these organizations support crude marijuana – but this is not accurate. For example, the ACP supported research into cannabinoids such as THC but they specifically stated "The ACP encourages the use of nonsmoked forms of THC that have proven therapeutic value." It must be non-smoked and it must have proven value such as being approved by the FDA.[5]

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[4] Bonner, R., Marijuana Rescheduling Petitions, 57 Federal Register 10499-10508; *Alliance for Cannabis Therapeutics v. DEA and NORML v. DEA*, 15 F.3d 1131 (D.C. Cir 1994)

Inter-Agency Advisory Regarding Claims That Smoked Marijuana Is Medicine – The U.S. Food and Drug Administration, 20 April 2006, www.fda.gov/bbs/topics/NEWS/2006/NEW01362.html

[5] Supporting Research into the Therapeutic Role of Marijuana, American College of Physicians, 2008

The supporters of "medical" marijuana want to confuse support for research into specific chemicals in marijuana with support for smoked marijuana as a medicine. There is some scientific interest in the exploration of the therapeutic uses for some of the individual chemicals in marijuana. However, we must distinguish between the exploration of the therapeutic potential of these chemicals with support for smoking as a delivery system for these chemicals. No reputable medical organization has come out in favor of smoking marijuana as a good or preferred delivery method.

Drs. Eric Voth and Richard Schwartz, experts on marijuana, having extensively reviewed available therapies for chemotherapy-associated nausea, glaucoma, multiple sclerosis, and appetite stimulation, determined that no compelling need exists to make crude marijuana available as a medicine for physicians to prescribe. They concluded that the most appropriate direction for research is to research specific cannabinoids or synthetic analogs rather than pursuing the smoking of marijuana.[6]

The conclusions of Drs. Voth and Schwartz were echoed by the National Academy of Science's Institute of Medicine (hereinafter IOM Report) in an assessment of scientific marijuana and cannabinoid research.

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[6] Voth EA, Schwartz RH. Medicinal Applications of Delta-9-Tetrahydrocannabinol and Marijuana. *Annals of Internal Medicine* 1997;126:791-798.

They see "little future in smoked marijuana as a medicine."[7]

**There are safe medicines available**

Legalization advocates would have the public and policy makers incorrectly believe that marijuana is the only treatment alternative for masses of cancer sufferers who are going untreated for the nausea associated with chemotherapy, and for all those who suffer from glaucoma, multiple sclerosis, and other ailments. However, numerous effective medications are currently available for these conditions. The advocates of "medical" marijuana list cancer, epilepsy, spasticity, and AIDS as conditions for which "medical" marijuana can be used. According to Dr. Eric Voth, a Fellow of the American College of Physicians, the only use for cancer treatment is the nausea associated with chemotherapy, or appetite stimulation, but there are better FDA approved medications available. There are no uses for treating epilepsy. With AIDS it has been claimed to help appetite but there are better safer FDA medications for this. The only remotely

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[7] *Marijuana and Medicine: Assessing the Science Base.* Janet E. Joy, Stanley J. Watson, Jr., and John A. Benson, Jr., Editors. Division of Neuroscience and Behavioral Health, Institute of Medicine, National Academy of Sciences. National Academy Press, Washington D.C., 1999; http://www.nap.edu/html/marimed

documented benefit is with spasticity but there are better medicines available.[8]

For example, below is a list of the FDA approved medications currently available for chemotherapy, and other ailments.

Serotonin Antagonists
Ondansetron (Zofran)
Granisetron (Kytril)
Tropisetron (Navoban)
Dolasetron
Phenothiazines
Prochlorperazine (Compazine)
Chlorpromazine (Thorazine)
Thiethylperazine (Torecan)
Perphenazine (Trilafon)
Promethazine (Phenergan)
Corticosteroids
Dexamethasone (Decadron)
Methylprednisolone (Medrol)
Anticholinergics
Scopolamine (Trans Derm Scop)
Butyrophenones
Droperidol (Inapsine)

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[8] The Potential Medical Liability for Physicians Recommending Marijuana as a Medicine, Educating Voices, http://www.educatingvoices.org (go to bottom of web page); Brief of the Institute on Global Drug Policy of the Drug Free America Foundation; National Families in Action; Drug Watch International; Drug-free Kids: America's Challenge, et al., as Amici Curiae in Support of Petitioner 2001 WL 30659 (Jan. 10, 2001), *U.S. v. Oakland Cannabis Buyers' Cooperative*, 121 S.Ct. 1711 (2001); a cannabinoid based medicine named Sativex is currently working its way through the FDA process.

Haloperidol (Haldol)
Domperidone (Motilium)
Benzodiazepines
Lorazepam (Ativan)
Alprazolam (Xanax)
Substituted Benzamides
Metoclopramide (Reglan)
Trimethobenzamide (Tigan)
Alizapride (Plitican)
Cisapride (Propulsid)
Antihistamines
Diphenhydramine (Benedryl)[9]

Marijuana legalization advocates would have you believe that crude marijuana is "medicine" and not a harmful drug. The scientific studies state the contrary. Recent studies show the following destructive effects of using marijuana:

birth defects
the worsening of pain
lung damage
causes cancer including in children and testicular cancer
AIDS – marijuana opens the door to Kaposi's sarcoma
brain damage

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[9] Brief of the Institute on Global Drug Policy of the Drug Free America Foundation; National Families in Action; Drug Watch International; Drug-free Kids: America's Challenge, et al., as Amici Curiae in Support of Petitioner 2001 WL 30659 (Jan. 10, 2001), U.S. v. Oakland Cannabis Buyers' Cooperative, 121 S.Ct. 1711 (2001); List reconfirmed by Dr. Eric Voth on May 14, 2006.

strokes
immune system damage
mental illness
violence
infertility
addiction[10]

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[10] Risk of Selected Birth Defects with Prenatal Illicit Drug Use, Hawaii, 1986-2002, *Journal of Toxicology and Environmental Health*, Part A, 70: 7-18, 2007; "Too Much Cannabis Worsens Pain" – *BBC News*, 24 October 2007; "Study Finds that Marijuana Won't Stop Multiple Sclerosis Pain" – *Neurology*, 2002; 58:1404-1407; Marijuana Smoke Contains Higher Levels of Certain Toxins Than Tobacco Smoke, *Science Daily*, December 18, 2007; Marijuana Smokers Face Rapid Lung Destruction – As Much as 20 Years Ahead of Tobacco Smokers, *Science Daily*, January 27, 2008; "Use of Marijuana Impairs Lung Function" – *Addiction*, 2002; 97:1055-1061; "Respiratory and Immunologic Consequences of Marijuana Smoking" – *Journal of Clinical Pharmacology*, 2002; 42:71S-81S; "Association Between Marijuana Use and Transitional Cell Carcinoma" – *Adult Urology*, 2006; 100-104; Maternal Use of Recreational Drugs and Neuroblastoma in Offspring: a Report from the Children's Oncology Group (United States) Cancer Causes Control, 2006 Jun;17(5):663-9; Marijuana may Raise Testicular Cancer Risk: Study, Reuters, February 9, 2009; "Marijuana Component Opens The Door For Virus That Causes Kaposi's Sarcoma" – *Science Daily*, 2 August 2007; "Marijuana May Affect Blood Flow in Brain" – *Reuters*, 7 February 2005; "More Evidence Ties Marijuana to Stroke Risk" – Reuters Health, 22 February 2005; "Immunological Changes Associated with Prolonged Marijuana Smoking" – American College of Allergy, *Asthma and Immunology*, 17 November 2004; "Cannabis-Related Schizophrenia Set to Rise, Say Researchers" – *Science Daily*, 26 March 2007; "Report: Using Pot May Heighten Risk of Becoming Psychotic" – *Associated Press*, 26 July 2007; "Anterior Cingulate Grey-Matter Deficits and Cannabis Use in First-Episode Schizophrenia" – *The British Journal of Psychiatry*, 2007; 190: 230-236; "Marijuana Increases

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Smoking is a very poor way to deliver medicine. The smoking of marijuana has significant risks. It is difficult to administer safe, regulated dosages of medicines in smoked form. Furthermore, the harmful

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the Risk of Both Psychosis In Non-Psychotic People As Well As Poor Prognosis For Those With Risk of Vulnerability to Psychoses" – *American Journal of Epidemiology*, 2002; 156:319-327; "Psychophysiological Evidence of Altered Neural Synchronization in Cannabis Use: Relationship to Schizotypy" – *Am J Psychiatry*, 2006; 163:1798-1805; "Marijuana Linked to Schizophrenia, Depression" – *British Medical Journal*, 21 November 2007; "Cannabis Shows Anti-Depression Benefits But Too Much Has Reverse Effect" – *The Canadian Press*, 24 October 2007; "Differential Effects of Delta-9-THC On Learning in Adolescent and Adult Rats" – *Pharmacology Biochemistry and Behavior*, 2 May 2006; The Occurrence of Cannabis Use Disorders and Other Cannabis Related Problems Among First Year College Students, *Addictive Behaviors* 33(3):397-411, March 2008; "Marijuana Firmly Linked to Infertility" – *Scientific American*, 22 December 2000; The Occurrence of Cannabis Use Disorders and Other Cannabis Related Problems Among First Year College Students, *Addictive Behaviors* 33(3):397-411, March 2008; "Regular or Heavy Use of Cannabis Was Associated with Increased Risk of Using Other Illicit Drugs" – *Addiction*, 2006; 101:556-569; "As Marijuana Use Rises, More People Are Seeking Treatment for Addiction" – *Wall Street Journal*, 2 May 2006; "Adolescent Cannabis Exposure Alters Opiate Intake and Opioid Limbic Neuronal Populations in Adult Rats" – *Neuropsychopharmacology*, 2006, 1-9; "Twenty-Five Year Longitudinal Study Affirms Link Between Marijuana Use and Other Illicit Drug Use" – Congress of the United States,14 March 2006; "New Study Reveals Marijuana is Addictive and Users Who Quit Experience Withdrawal" – All Headline News, 6 February 2007

chemicals and carcinogens that are byproducts of smoking create entirely new health problems.[11]

The respiratory difficulties associated with marijuana use preclude the inhaled route of administration as a medicine. Smoked marijuana is associated with higher concentrations of tar, carbon monoxide, and carcinogens than even cigarette smoke.[12] Marijuana adversely impairs some aspects of lung function, causes abnormalities in the cells lining the airways of the upper and lower respiratory tract and in the airspaces deep within the lung, and has been associated with the development of cancer.[13]

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[11] Brief of the Institute on Global Drug Policy of the Drug Free America Foundation; National Families in Action; Drug Watch International; Drug-free Kids: America's Challenge, et al., as Amici Curiae in Support of Petitioner 2001 WL 30659 (Jan. 10, 2001), *U.S. v. Oakland Cannabis Buyers' Cooperative*, 121 S.Ct. 1711 (2001)

[12] Wu et al., Pulmonary hazards of smoking marijuana as compared with tobacco, NEJM, 1988:318:347-351.

[13] Barbers et al., Differential examination of bronchoalveolar lavage ceus in tobacco cigarette and marijuana smokers, Am Rev Respir Dis 1987:135:1271-1275; Fligiel et al., Bronchial pathology in chronic marijuana smokers: a light and electron microscopic study, *Journal of Psychoactive Drugs* 1988:20:33-42; Gong et al., Acute and subacute bronchial effects of oral cannabinoids, Clin Pharmacol Ther. 1984:35:26-32; Tashkin, Is frequent marijuana smoking harmful to health? *Western Journal of Medicine* 1993:158:635-637; Tashkin et al., Respiratory status of seventy-four habitual marijuana smokers, Chest 1980:78:699-706; Tashkin, Shapiro, Lee & Harper, Subacute effects of heavy marijuana smoking on pulmonary function in healthy men, NEJM 1976:294:125-129; Tashkin, Sirons & Clark, Effect of

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In addition to these cellular abnormalities and consequences, contaminants of marijuana smoke are known to include certain forms of bacteria and fungi. Those at particular risk for the development of disease and infection when these substances are inhaled, are those users with impaired immunity such as those with AIDS.[14]

Smoking marijuana can cause intoxication, precipitation of anxiety or acute psychotic reactions, orthostatic hypotension and bronchial inflammation. For a drug to be acceptable, its beneficial results must outweigh the adverse effects, especially when

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habitual smoking of marijuana alone and with tobacco on nonspecific airways hyperreactivity, *Journal of Psychoactive Drugs* 1988:20:21-25; Tilles et al., Marijuana smoking as cause of reduction in single-breath carbon monoxide diffusing capacity, *American Journal of Medicine* 1986:80:601-606; Barbers et al., Chemotaxis of peripheral blood and lung leukocytes obtained from tobacco and marijuana smokers, *Journal of Psychoactive Drugs* 1988:20:15-20; Buckley, A case-control study of acute non-lymphoblastic leukemia: evidence for an association with marijuana exposure, Cannabis: Physiopathology, Epidemiology, Detection pp. 155-162 (CRC Press 1993); Murison et al., Cannabinoids induce incomplete maturation of cultured human leukemia cells, Proc Natl Acad Sci USA 1987:84:55414-5418; *Robison et al., Maternal drug use and risk of childhood non-lymphoblastic leukemia among offspring, Cancer* 1989:63:1904-1911.

[14] Fleisher, Winawer & Zauber, Aspergillosis and marijuana, Annals of Internal Medicine 1991:115:578-579; Ramirez, Acute pulmonary histoplasmosis: newly recognized hazard of marijuana plant hunters, *American Journal of Medicine* 1990:88:5-60N-5-62N; Taylor et al., Salmonellosis associated with marijuana: a multi state outbreak traced by plasmid fingerprinting, NEJM 1982:306:1249-1254.

the claim is that it can be used repeatedly for symptomatic relief of chronic disorders.[15]

In recent years there has been a great public effort to curtail tobacco because of its effects on health yet the advocates of legalization promote smoking marijuana. Yet, a recent study shows that marijuana smoke has ammonia levels 20 times higher than tobacco smoke. Marijuana has hydrogen cyanide, nitric oxide, and aromatic amines at 3-5 times higher than tobacco smoke.[16] Another study shows that that marijuana smokers face rapid lung destruction – as much as 20 years ahead of tobacco smokers.[17]

Amici assert that in the interest of protecting seriously and terminally ill patients from unsafe and ineffective drugs, the safety and efficacy process of the FDA cannot be bypassed. The FDA has thoroughly examined the possible use and/or re-classification of crude marijuana, and it has correctly determined that crude marijuana is an impure and toxic substance that has no place in the medical armamentarium.

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[15] "Smoked Marijuana as Medicine: Not Much Future," *Clinical Pharmacology & Therapeutics* (2008), H Kalant, Department of Pharmacology, University of Toronto, Toronto, Ontario, Canada

[16] Marijuana Smoke Contains Higher Levels of Certain Toxins Than Tobacco Smoke, *Science Daily*, December 18, 2007

[17] Marijuana Smokers Face Rapid Lung Destruction – As Much as 20 Years Ahead of Tobacco Smokers, *Science Daily*, January 27, 2008

Furthermore, by means of its appropriate regulatory processes, the FDA remains available to petitioning for reclassification, should sufficient evidence for such change of classification arise. To date, it has not. On April 20, 2006, the FDA issued the following Statement, released in response to a congressional debate on the issue of medical marijuana use:

**FDA STATEMENT – INTER-AGENCY ADVISORY REGARDING CLAIMS THAT SMOKED MARIJUANA IS A MEDICINE**

> Claims have been advanced asserting smoked marijuana has a value in treating various medical conditions. Some have argued that herbal marijuana is a safe and effective medication and that it should be made available to people who suffer from a number of ailments upon a doctor's recommendation, even though it is not an approved drug.
>
> Marijuana is listed in schedule I of the Controlled Substances Act (CSA), the most restrictive schedule. The Drug Enforcement Administration (DEA), which administers the CSA, continues to support that placement and FDA concurred because marijuana met the three criteria for placement in Schedule I under 21 U.S.C. 812(b)(1) (e.g., marijuana has a high potential for abuse, has no currently accepted medical use in treatment in the United States, and has a lack of accepted safety for use under medical supervision). Furthermore, there is currently sound evidence that smoked marijuana is

harmful. A past evaluation by several Department of Health and Human Services (HHS) agencies, including the Food and Drug Administration (FDA), Substance Abuse and Mental Health Services Administration (SAMHSA) and National Institute for Drug Abuse (NIDA), concluded that no sound scientific studies supported medical use of marijuana for treatment in the United States, and no animal or human data supported the safety or efficacy of marijuana for general medical use. There are alternative FDA-approved medications in existence for treatment of many of the proposed uses of smoked marijuana.

FDA is the sole Federal agency that approves drug products as safe and effective for intended indications. The Federal Food, Drug, and Cosmetic (FD&C) Act requires that new drugs be shown to be safe and effective for their intended use before being marketed in this country. FDA's drug approval process requires well-controlled clinical trials that provide the necessary scientific data upon which FDA makes its approval and labeling decisions. If a drug product is to be marketed, disciplined, systematic, scientifically conducted trials are the best means to obtain data to ensure that drug is safe and effective when used as indicated. Efforts that seek to bypass the FDA drug approval process would not serve the interests of public health because they might expose patients to unsafe and ineffective drug products. FDA has not

> approved smoked marijuana for any condition or disease indication.
>
> A growing number of states have passed voter referenda (or legislative actions) making smoked marijuana available for a variety of medical conditions upon a doctor's recommendation. These measures are inconsistent with efforts to ensure that medications undergo the rigorous scientific scrutiny of the FDA approval process and are proven safe and effective under the standards of the FD&C Act. Accordingly, FDA, as the federal agency responsible for reviewing the safety and efficacy of drugs, DEA as the federal agency charged with enforcing the CSA, and the Office of National Drug Control Policy, as the federal coordinator of drug control policy, do not support the use of smoked marijuana for medical purposes. www.fda.gov/bbs/topics/NEWS/2006/NEW01362.html

Marijuana is intoxicating, so it's not surprising that sincere people report relief of their symptoms when they smoke it. They may be feeling better – but they are not actually getting better. They may even be getting worse due to the detrimental effects of marijuana.

Before the development of modern pharmaceutical science, the field of medicine was fraught with potions and herbal remedies. Many of those were absolutely useless, or conversely were harmful to unsuspecting subjects. Thus evolved our current Food and Drug Administration and drug scheduling processes, which

Congress has authorized in order to create a uniform and reliable system of drug approval and regulation. This system is being intentionally undermined by the legalization proponents through use of medical marijuana initiatives.

## ARGUMENT II

## IT IS INEVITABLE THAT MARIJUANA PRODUCED FOR MEDICINAL USE WILL FALL INTO THE HANDS OF RECREATIONAL DRUGS USERS BECAUSE RECREATIONAL DRUG USERS WILL EXPLOIT THE LAWS IN ORDER TO OBTAIN A MARIJUANA RECOMMENDATION THUS MAKING IT EVEN MORE DIFFICULT TO ACHIEVE THE GOAL OF CONGRESS TO ELIMINATE THE USE OF MARIJUANA

The amount of marijuana permitted by the "medical" marijuana law exceeds any reasonable amount. In 2003, the California Legislature passed a statutory scheme to implement Proposition 215. Cal. Health & Safety Code §§ 11362.7-11362.83. The Legislature authorized patients and caregivers to grow six mature marijuana plants. *Id.* at § 11362.77(a). If a doctor recommends more, the quantity can be increased to an amount "consistent with the patient's needs." Cal. Health & Safety Code § 11362.77(b). Six plants can create a huge amount of marijuana. The typical marijuana plant produces 1 to 5 pounds of smokeable materials (leaves and buds). Maybe more if grown indoors under the right conditions. The 6

plants permitted by the bill can thus produce a minimum of 6 to 30 pounds of marijuana per year.[18]

A typical marijuana joint is estimated to weigh about 0.4 grams. If a standard joint is 0.4 grams of average-quality 6% marijuana buds, an ounce of "standard marijuana" equals more than 60 joints. An ounce of more potent 12% sinsemilla is 120 joints. Thus an ounce is from 60 to 120 joints.[19]

Thus, the law permits people to grow up to 6 plants per "patient" and the plants can produce 6 to 30 pounds of marijuana per year. **This is 5,760 to 28,800 joints for standard marijuana and 11,520 to 57,600 for sinsemilla per year.** This large amount of marijuana is unregulated and can easily be diverted for recreational use. What other medicine is dispensed in such huge quantities?

## The California Law Is Widely Abused and Generates Citizen Outrage

Since California passed its "medical" marijuana law, more than 90 cities and counties in the state

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[18] Drug Identification Bible, third edition, page 606, Tim Marnell editor, Denver, CO, 800-772-2539 (a book for law enforcement, parents and educators)

[19] Economics of cannabis legalization, written by Dale Gieringer, Ph.D., coordinator, California NORML (National Organization for the Reform of Marijuana Laws). Reprinted from Ed Rosenthal, ed., Hemp Today pp. 311-24. (Quick American Archives, Oakland, CA 1994)

have had to pass moratoriums or bans on the distribution of marijuana in their communities. As a result of these abuses, only 24 out of California's 58 counties now issue marijuana ID cards. In North Hollywood California there are now more "medical" marijuana clubs than Starbucks outlets. Less than two years ago, there were only four marijuana dispensaries in Los Angles. Today, there are more than 100.[20]

The founders of the U.S. "medical" marijuana movement have reversed key positions of support for "medical" marijuana. Rev. Scott Imler, Co-founder of Prop. 215 the California "medical" marijuana law, has lamented the passage of the law stating that, "We created Prop. 215 so that patients would not have to deal with black market profiteers. But today it is all about the money. Most of the dispensaries operating in California are little more than dope dealers with store fronts." Imler also said that "medical" marijuana has "turned into a joke."[21]

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[20] Daily News Los Angeles, CA January 19th, 2007; Santa Cruz Sentinel, As We See It: Medical Marijuana Abuse?, March 12, 2007; What Every American Should Know About Medical Marijuana, Office of National Drug Control Policy, 750 17th St. NW, Washington, D.C. 20503 (202) 395-6618 www.WhiteHouse DrugPolicy.gov

[21] What Every American Should Know About Medical Marijuana, Office of National Drug Control Policy, 750 17th St. NW, Washington, D.C. 20503 (202) 395-6618 www.WhiteHouse DrugPolicy.gov; Alternatives Magazine, Fall, 2006 Issue 39, San Gabriel Valley Tribune 2/07, Message from Steve Kubby, Steve Kubby Released After Serving 62 Days in Jail, April 14th, 2006

**The California "medical" marijuana dispensaries are out of control**

The average marijuana dispensary in California makes $20,000 in profit each day. Marijuana providers buy marijuana wholesale from street dealers and resell it for twice the amount.[22] A story from the T.V. news show *60 Minutes* shows that in California "there are legions of people buying 'medical' marijuana for the sole purpose of getting high." They are getting marijuana for such conditions as dry skin, hair loss and because high heels hurt a woman's feet. According to *60 Minutes*, the "medical" marijuana they buy goes under the names of: Snow White, Super Girl, Afghan Dreams, or New York Diesel.[23]

Some examples of the problems caused by the "medical" marijuana dispensaries are:

Street level dealers attempting to sell to people entering the business

Smoking of marijuana in public areas

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[22] Glazer, Andrew. Medical Marijuana Clinics Face Crackdown, Associated Press, March 11th, 2007; Vendor's Reefer Sadness LA Times, December 27th, 2006, LA City Beat, La, Ana, February 15th, 2007; What Every American Should Know About Medical Marijuana, Office of National Drug Control Policy, 75017 th St. NW, Washington, D. C. 20503 (202) 395-6618 www.WhiteHouseDrugPolicy.gov; *Daily News* Los Angeles, CA January 19th, 2007, *Santa Cruz Sentinel*, As We See It: Medical Marijuana Abuse?, March 12, 2007

[23] California Pot Shops, Morley Safer, 60 Minutes (CBS News) 12/30/2007

Increased "driving while under the influence of marijuana" violations

Attempted burglaries of marijuana establishments

Robberies of clients as they leave businesses with their purchases

Adverse impact on neighboring businesses

Presence of a physician on the premises issuing recommendations for use, which drew numerous people from out of the area

Lack of effort on the part of dispensary owners/employees to control unlawful or nuisance behavior in and around the business

Increased loitering and associated nuisances

Complaints that other illegal drugs were sold from the dispensaries

Trading of marijuana purchased at a dispensary to a minor for sex

Purchasers congregating and smoking marijuana in areas frequented by children

Sales of marijuana to persons not holding the appropriate certificate.[24]

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[24] Memorandum from Chief David Livingston, Concord California Police Department, to the Mayor and Council Members, August 29, 2003; http://www.californiapolicechiefs.org. Then click on Medical Marijuana Dispensary Information.

## CONCLUSION

Amici believe that it is critically important that the Supreme Court uphold the supremacy of the federal FDA regulatory process, and its carefully researched determination that there is no currently accepted medical use for crude, or home-grown, marijuana, and that therefore there can be no "medical use" exception to the Controlled Substances Act. Logically, then, the lower Court cannot create a distinct class of activities out of the "medical use" subgroup, and therefore the alleged medical use of marijuana is an activity which must come under the jurisdiction of the federal Controlled Substance Act, as authorized by the Commerce Clause of the U.S. Constitution. Accordingly, the decision of the lower Court should be reversed.

Respectfully submitted,

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## APPENDIX I

### LIST OF AMICI

Bruce Frankel, San Diego Prevention Coalition, San Diego, CA; Stephanie Haynes, Save our Society from Drugs, Alpine, TX; Ken Carter, Med Rx Pharmacies, Escondido, CA; David R. Pease, Get a G.R.I.P. America, Vero Beach, FL; Steve Steiner, DAMMAD, Gilford, NH; Brenda Chabot, Inland Valley Drug Free Community Coalition, CA; Coalition for a Drug Free California; Eric Voth, M.D., FACP, Chairman the Institute on Global Drug Policy, Topeka, KS; Sue Rusche, President and CEO National Families in Action, Atlanta, GA; Sandra S. Bennett, Co-Editor Marijuana Research Review, past president Drug Watch International; Geraldine Silverman, federation for Drug Free Communities, Short Hills, NJ; Debbie Lindner, Federation for Drug Free Communities, Livingston, NJ; Lisa Brady, Superintendent-Hunterdon Regional High School, Flemington, NJ; Christina Steffner, Principal-Hunterdon Central Regional High School, Flemington, NJ; John K. Cornette, Yankton, SD; Jeanette McDougal, N.A.H.A.S., Osceola, AR; William R. Caltrider Jr., Center for Alcohol and Drug Research and Education, Baltimore, MD; Cindy Houghton, Oasis Christian Fellowship & Carlsbad Mental Health, Carlsbad, NM; Francine McDermott, M.A., Educator Investigator, Blythe, CA; Malcolm Beyer, Student Drug Testing Coalition, Jupiter, FL; Joyce Nalepka, Drug Free Kids: America's Challenge, Silver Spring, MD; Harry Montoya, Hands Across Cultures, Corp., Espanola,

NM; Shirley Morgan, Oregonians Against Legalization of Marijuana, Welches, OR; Andrea G. Barthwell, MD EMGlobal LLC, Arlington, VA; Eleaner Scott, Westminster Area Community Awareness Action Team, Westminster, CO; John Lunt, DEA Supervisory Special Agent, Retired, Fort Worth, TX; David Gross, MD, Chair, International Scientific and Medical Forum on Drug Abuse; Judi Strang, San Dieguito Alliance for Drug Free Youth, Del Mar, CA; Roger Morgan and Carla Lowe, Californians For Drug-Free Schools; Betty S. Sembler, Founder and Chair, Save our Society from Drugs, FL; Calvina Fay, Executive Director Drug Free America Foundation, Inc., FL; Robert DuPont, MD, President Institute for Behavior and Health, Inc. MD; Judy Kreamer, President Educating Voices, Inc. Naperville, IL; Cornelius J. Behan, Towson, MD; Lt. Edward Moses, Ret. Founder Missouri Federation of Parents, Warrenton, MO; Peter B. Bensinger, President Bensinger, DuPont & Assoc., Chicago, IL; Tom Constantine, Superintendent NY State Police (Ret) Administrator U.S. Drug Enforcement Administration (Ret), Niskayuna, NY; Eve Flanigan, Program Manager Carlsbad Comm. Antidrug/Gang Coalition, Carlsbad, NM; Richard Bucher, PhD, the Chairman of the Board Drug Free Kids: America's Challenge, Fort Washington, MD; Linda Taylor, Exec. Director Repeal Prop 36 Fund, Turlock, CA; Theresa Costello, Port Richmond Community Group, Philadelphia, PA; Darlind Davis, Exec. Director Drug-Free Moore County, Pinehurst, NC; Janet Y. Maust, Families against Legalization, Hopwood, PA; Stephen Winkler, Goff, KS; Kathy Burson

M.A. and Marjorie Grove, Co-Executive Directors PRIDE-Omaha, Omaha, NE; Heather Winkler, Walz Tetrick Advertising, Mission, KS; Steve Halbett, Kansas Department of Transportation, Topeka, KS; John & Mary Lu O'Halloran; Dixie Brewster, Milton, KS; Dr. Harvey Graves, President and CEO of Pinnacle Medical Management Houston, TX; Safe Approved Medicine for New Jersey, Trenton, NJ; Drug Free Schools Coalition, Flemington, NJ; Elizabeth Edwards, Drug Free Projects Coalition, AZ; Students Taking Action not Drugs, FL; Drug Free Schools Coalition of New York, Lyon Mt., NY; Nancy Starr, The Chemical People of Erie County, PA; Joseph Giunta, President, New Hampshire State Elks Association, Chairman, NH Elks Youth Drug and Alcohol Awareness program, Sanbornton, NH; John K. Cornette, Yankton, SD; Sharon Smith, MOMSTELL, PA; John Pastuovic, Director, Coalition to End Needless Death on our Roadways (END), Chicago, IL; Michael C. Barnes, Esq., Member, DCBA Law & Policy, Arlington, VA; Paul Scott O'Neill, Coalition Manager, Friends of the DEA, Arlington, VA; Alan Aresnault, Odd Squad Productions BC, Canada; Jerome Houfek, Drug Free Workplace Network WI; DeForest Rathbone, Jr., National Institute of Citizen Anti-Drug Policy VA; Karen Belanger, National Drug-free Workplace Alliance FL; Lana Beck, Students Taking Action Not Drugs FL; Alice A. Silverman; Connecticut State Senator Toni Boucher; Michelle Voth, Executive Director, Kansas Family Partnership, Topeka, KS.